92-416 No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOANNE M. WESTON, Petitioner,

vs.

FIRST INTERSTATE BANK OF CALIFORNIA;
FIRST INTERSTATE MORTGAGE COMPANY;
AND
FRANKLIN S. CIBULA, A LAW CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner in pro per

QUESTIONS PRESENTED

The primary question in this case is jurisdictional; to what extent may a bankruptcy judge issue orders in a case after the timely filing of an appeal?

Secondary issues are:

1. Whether the jurisdictional issue cited above, as well as the other issues, including due process rights, were given proper consideration by the two reviewing courts below.

2. Whether certain improper judicial procedure was committed by BAP Judge Barry Russell which was ignored by the Ninth Circuit Court of Appeals.

3. Whether the decisions of the three courts below were influenced by the fact that the petitioner was not an attorney and was proceeding in pro per.

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Petitioner, JoAnne M. Weston, acting in pro per, respectfully requests that a writ of certiorari issue to review the judgment entered in C.A. Case No. 91-15722 by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinions issued in the proceedings below in this case were not reported. The instant case actually consisted of

three appeals from multiple orders issued by the same judge, the Honorable David E. Russell, Bankruptcy Court Judge for the Eastern District of California. The three appeals were consolidated by the United States Bankruptcy Appellate Panel of the Ninth Circuit. The subject orders of the appeal BAP No. EC 89-1256 are included in the Appendix at pages A-37 through 52, the subject orders of BAP No. EC 89-1796 are in the Appendix at pages A-61 through 85, and those of BAP No. EC 89-1816 are in the Appendix at pages A-86 through 87.

The BAP Memorandum, affirming the lower court orders in two of the appeals, and reversing only to a very limited extent in the third, was issued on January 10, 1991, and is included in the Appendix at pages A-7 through 34. The petitioner's timely motion for rehearing was denied by the BAP on April 9, 1991, and that order appears in the Appendix at page A-99.

The petitioner timely appealed the decision of the Bankruptcy Appellate Panel to the Ninth Circuit Court of Appeals, Case No. 91-15722. Two other related ones that also appealed orders by Judge Russell were already pending before the Ninth Circuit Court of Appeals; Case No. 90-16501 and No. 91-15360. In fact, the matters contained in those previously filed cases had led to the various orders being appealed in the instant case, No. 91-15722. The Ninth Circuit Panel's decision in this instant case is contained in the Appendix at pages A-1 through 4. The timely petition for rehearing was denied on April 1, 1992, and is included at page A-98.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was issued in this case on February 4, 1992. The petitioner's timely petition for rehearing was denied on April 1, 1992. On June 18, 1992, the

petitioner Weston's application for an extension of time within which to file a petition for a writ of certiorari was granted by Supreme Court Justice O'Connor, extending the time up to and including July 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution that are involved in this case are found in the Fifth and Fourteenth Amendments. The Fifth Amendment, in relevant part, states: "No person shall be... deprived of life, liberty, or property without due process of law...." In the Fourteenth Amendment, it is made clear that a citizen of the United States is entitled to such due process of law, and even forbids the individual States from abridging that right, declaring that no state shall be allowed to deprive a citizen of such constitutional "privileges or

immunities; ... nor ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The governing statute of the Bankruptcy Code ("Code") involved in the question of what orders a bankruptcy judge may issue following the filing of an appeal is found in Rule 8005, Federal Rules of Bankruptcy Procedure, 11 U.S.C. ("FRBP"). That statute states, in relevant portion, that: "the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." FRBP 8005, emphasis added.

STATEMENT OF THE CASE

The proceedings below constitute a torturous path indeed. The instant case,

C.A. Case No. 91-15722, as stated supra, actually is the third related case taken to the Ninth Circuit Court of Appeals that involves the various orders of the same bankruptcy judge, and the orders in this instant case came about as the result of the orders contained in the previously filed appeals, C.A. Case Nos. 90-16501 and 91-15360. All of the appeals, either directly or indirectly, have resulted from a dispute between Judge Russell and the petitioner Weston; i.e., whether or not certain creditor actions, taken prior to Weston's filed notice of appeal re the sua sponte dismissal of her first Chapter 11 case, were in violation of any stay under the Code. Weston contended that the acts were in violation of stay, while Judge Russell contended that the acts "occurred while no bankruptcy case was pending", and thus, were not in violation of any stay.

Jurisdiction over the bankruptcy

proceedings is provided to the bankruptcy court by 28 U.S.C. § 157(b).

Weston's first Chapter 11 case, No. 285-00957-D-11, was filed in March 1985. At the time of filing the petition, Weston was involved in certain litigation over a real estate project that had been deliberately blocked by certain insiders. Weston had discharged her former attorney, Franklin S. Cibula ("Cibula"), when she had discovered he had conspired with the adverse parties against her best interests. Cibula's breach of fiduciary duty had been a primary cause of Weston's seeking the Chapter 11 protection. Cibula had filed a state court complaint against Weston for his claimed fees, which was stayed by the Chapter 11 filing.

Also stayed by the Chapter 11 filing were foreclosure sales of Weston's real property, which had been encumbered to help finance the project; Weston's 64-acre

ranch (the "home property"), and a building located in the City of Mount Shasta (the "commercial property"). Two of the insiders had initiated the foreclosures; R.R. and F.M. Rodriguez ("Rodriguez"). A lawsuit filed by Weston against Rodriguez, charging usury, breach of contract and improper foreclosure actions, was also stayed by the Chapter 11 filing (by the State Court, not the bankruptcy court).

On December 5, 1985, the bankruptcy court denied a motion for relief from the automatic stay that had been filed by the disputed creditor Rodriguez. Entry of the order, which stated that the automatic stay was to "remain in full force and effect as against (Rodriguez)", was on the 17th of December. On December 22, 1985, unknown at the time to Weston or the bankruptcy court, Rodriguez rescheduled the foreclosure sales, setting them for February 24, 1986.

Also on December 5, 1985, counsel for First Interstate Mortgage Company ("FIMC"), the servicing agent for the beneficiary of the first trust deed recorded against Weston's home property, First Interstate Bank of California ("FICAL"), had executed a stipulated agreement which provided that Weston could cure the arrearages under the mortgage by including a half-payment along with the regular monthly installments. The agreement had been drawn up by FIMC's attorneys, and declared that it was to be binding on the parties regardless of Weston's bankruptcy status. FICAL was also the beneficiary of the second and third trust deeds, all of which were superior to the fourth, held by the disputed creditor Rodriguez. Following a properly noticed hearing, the stipulated agreement between Weston and FIMC was approved by the court on January 13, 1986.

On January 14, 1986, the unexpected

sua sponte dismissal order was entered, and notice of the order was sent out on the same date. On January 15, Cibual applied for, and was granted, a default judgment against Weston in his complaint for legal fees, which was promptly used to record liens against Weston's various properties. On January 17, 1986, Weston's bankruptcy attorney served a motion to reconsider on all parties. The motion was argued (with Rodriguez and FIMC opposing) and submitted on February 19, 1986.

On February 24, 1986, the foreclosure sales were conducted. The only parties aware of this event were the agents conducting the sale for Rodriguez, the lawyer representing Rodriguez, and Rodriguez. With no other "bidders" aware or present, Rodriguez obtained Weston's two parcels of real property by a "credit bid" on each. On February 27, 1986, the denial of the motion to reconsider was entered, and on

March 5, 1986, Weston's timely notice of appeal was filed; BAP No. EC 86-1214. Due to being unable to provide her bankruptcy attorney with the $4,000 demanded, Weston was forced to proceed in pro per. The Bankruptcy Appellate Panel ("BAP") has jurisdiction over bankruptcy appeals under 28 U.S.C. § 158(b).

Weston attempted to honor the court-approved agreement with FIMC, but the January, February and March payments were all refused by FIMC, with the demand for full payment of all arrearages, including the claimed attorney's fees, which the bankruptcy court had denied. On October 24, 1986, while the appeal was pending, Weston filed her second Chapter 11 case, No. 286-05445-B-11, and therein began the path of conflict between Judge Russell and Weston.

Weston referred to the pending appeal re the first case, and the potential benefit to the estate's assets the appeal

could provide if prosecuted, in her plan and disclosure statement filed in her second case. After hearing, the disclosure statement was approved, with Weston allowed to proceed with confirmation when she was ready, in order to allow time for the prosecution of the appeal. (A-35, 36) Prior to the hearing, the BAP had issued a conditional order dismissing the appeal, based upon the fact that the February 24, 1986 foreclosure sales had "mooted" the pending appeal. (A-100) Upon learning the facts surrounding the foreclosures, as cited above, the dismissal order was then WITHDRAWN by the BAP. (A-101)

Despite the foregoing facts, Judge Russell issued orders based upon his conclusion that the sales had occurred while no case was pending, and thus were valid. Weston, in turn, was forced to also appeal those orders, all of which were ultimately transferred by the BAP to the District

Court, where three of these remain, temporarily stayed pending the out-come of one of these which was subsequently taken to the Ninth Circuit on appeal. The jurisdiction of the District Court to hear bankruptcy appeals is derived from 28 U.S.C. § 158(a), while the jurisdiction of the Ninth Circuit Court of Appeals is from 28 U.S.C. § 158(d). The three cases that remain in the District Court are: CIV-88-1439 MLS, CIV-88-1440 MLS, CIV-88-1442 MLS while the companion case, CIV-88-1441 MLS is now the Ninth Circuit Court of Appeals Case No. 90-16501.

On May 20, 1988, the BAP issued the decision in Weston's first appeal, BAP No. EC 86-1214, and the sua sponte dismissal order was VACATED for not being authorized under the Code, and the reinstated case remanded to the bankruptcy court. (A-102 through 104) The BAP decision did not cause Judge Russell to change his mind;

he continued to issue orders based upon his conclusion that the foreclosure sales occurred while no case was pending and were valid. In addition, he also ruled that the ten-day stay of FRBP 7062 did not apply to orders that dismissed bankruptcy cases, writing a rather lengthy opinion on the matter; Weston v. Cibula (In re Weston), 101 B.R. 202 (Bkrtcy. E.D. Cal. 1989). Weston had brought an action that sought to have Cibula's default judgment against her set aside for violating the automatic ten day stay of FRBP 7062, after the May 20, 1988 BAP decision. Cibula had obtained the default judgment the next day after the improper dismissal was entered. Judge Russell claimed that despite the plain language of the governing statutes, he didn't think Congress could have really meant what the statutes so clearly stated. That matter was, of course, also appealed, subsequently becoming the second related

appeal taken to the Ninth Circuit; Case No. 91-15360. The BAP decision in that appeal had misidentified the primary issue as being whether or not the automatic stay of 11 U.S.C. § 362(a) remained in effect during the period between an improper dismissal of a case and its later reversal on appeal. Despite Weston's attempt to point out the error by her motion for rehearing, the BAP refused to grant the rehearing motion, and the appeal resulted.

Weston also brought actions against FIMC and FICAL following the BAP decision. In various pleadings filed by the law firm that represented FIMC and Federal Home Loan Mortgage Corporation (a party claiming to be the beneficiary of the first trust deed by assignment), several false and misleading statements had been presented as fact, including claims that the pending appeals, including BAP No. EC 89-1214, had been denied. FICAL, in March of

1988, had initiated foreclosure proceedings under the second and third trust deed, without first seeking relief from stay from the bankruptcy court. Weston moved to have the bankruptcy court determine the amount due under the first trust deed, citing the breach by FIMC of the court-approved agreement, and requested sanctions for the false statements and the violation of stay committed by FICAL. In addition, Weston sought to have her costs on appeal taxed against Rodriguez and FIMC, and to have the two cases consolidated, since she had a viable plan on file and the court had approved the disclosure statement after a properly noticed hearing. These matters, listed as Motions JMW-3, 4 & 5, were ruled on by Judge Russel September 6, 1988. (A-37 through 43)

The Orders stated that because of the "confusion" sanctions against FIMC were not appropriate, but that the agreement

was valid, and FIMC had violated its terms when it refused Weston's payments. FIMC was ordered to prepare an accounting of its claims, and Judge Russell determined that Weston was not liable for late fees, attorneys' fees or foreclosure fees "over and above the $409.06 stipulated to" by Weston in the agreement. (A-39) He also denied Weston her costs on appeal, stating that it was the court that was the loser.

Weston was also ordered to make payments of $480 per month. Since Weston's plan on file called for paying the trust deeds by utilizing the subject property, once proper title to it was established by the determination of the pending appeals, Weston moved for reconsideration of certain portions of this order. The subsequent orders issued by Judge Russell in relation to this motion are the subject of the first appeal filed in this instant case, BAP No. EC 89-1256.

The subsequent orders issued by Judge Russell, and appealed in BAP No. EC 89-1256, if obeyed, would have mooted all of Weston's pending appeals. The Orders called for full payment, including attorney fees, of all three trust deeds held by FICAL within a six-month period of time. FICAL had belatedly moved for stay relief in November, 1988, Motion KAK-1, and at the continued hearing on Weston's reconsideration matters, and FICAL's belated stay relief motion, held on December 20, 1988, Judge Russell had stated that he was putting Weston "on a leash", and had ordered her to make monthly payments of $1,200, with FICAL being able to have stay relief with no further hearing if Weston failed to make the payments. (A-44 through 47) The orders were filed on January 11, 1989 and called for the payments to begin January 1, 1989.

Weston again filed a motion seeking

the bankruptcy court's reconsideration, Motion JMW-10. Weston's motion was granted, to some extent. The monthly payments were reduced to $325, but Weston had to provide for payment of the trust deed sums not in dispute within a six month period. At the January 31, 1989 hearing, Judge Russell stated that he thought the foreclosure sales by Rodriguez had occurred after Weston had filed her appeal, being misled.

Weston submitted a proposed order re Motion JMW-10, and FICAL's counsel submitted a revised version which changed the entire meaning of the orders. FIMC had filed its motion to determine claim, as had been ordered in the September Orders, and it was set for hearing on February 14, 1989. The motion was originally filed as DMT-2, but later was inadvertently changed to DMT-3. Judge Russell declared at this hearing that he would decide which of the two orders re JMW-10 he would sign.

At the February 14, 1989 hearing on the motion DMT-2/3, Judge Russell told Weston that he was not considering the issue of attorney's fees; he was only going to make a determination as to what principal, interest, late charges, etc., were due under the trust deeds. He had also assured Weston that she would be given an opportunity to examine the in camera billing statements re attorney's fees that had been submitted, before he made any ruling on them. The hearing had ended with Judge Russell implying that the dispute over attorney's fees would be heard at some future date. (See cited portions of Reporter's transcript at A-105 through 107). Following that hearing, Judge Russell chose to sign the Orders re Motion JMW-10 that had been submitted by FICAL's counsel. (A-48 through 52)

The orders stated that Weston was to provide for full payment, including the

attorney's fees, within six months of plan confirmation, which was set for April 17, 1989. At no time had there ever been any hearing held on the issue of whether or not the trust deeds provided for the attorney's fees, pursuant to the requirements of 11 U.S.C. § 506(b). Weston timely appealed the March 2, 1989 Orders re the motion JMW-10, listing the motion DMT-2 as among the matters being appealed, and included the February 14, 1989 hearing in the designated record. (A-110)

Weston moved for a stay pending appeal, which was denied by Judge Russell, as had been all her other motions for a stay. Judge Russell claimed that her prior pending appeals were not "jeopardized in any way" by his March 2, 1989 orders. (A-53 through 58) He later did grant Weston's motion for a stay of the monthly payments when her relocated retail business was flooded by toxic chemicals.

The second appeal in this case, BAP No. EC 89-1796, involves the orders issued due to Judge Russell's June 30, 1989 Memorandum Decision re the February 14, 1989 hearing on motion DMT-2/3. (A-61 through 81) The rulings contained in the Memorandum Decision, and the two subsequent orders awarding attorney's fees, as well as other charges claimed by FIMC and FICAL (A-82 through 85), impacted upon the subject matter contained in the prior appeal, BAP No. EC 89-1256. In addition, Judge Russell changed his prior ruling, contained in the September 1988 Orders and in the appeal, re the court-approved stipulated agreement between Weston and FIMC, now claiming that the agreement was not enforceable and that Weston was liable for all the costs incurred by FIMC in relation to that agreement. (A-62 through A-65)

The Memorandum Decision and the two

orders, involved matters that had been included in the prior appeal, BAP No. EC 89-1256, and Weston filed motions for the court to reconsider the rulings contained in the Memorandum Decision, citing that fact. The two motions, JMW-12 and JMW-13, were among the matters "dropped" by Judge Russell when he decided he didn't have to bother with the other matters on calendar because he was converting Weston's case. The subject orders to which the motions pertained became the subject orders of the second appeal filed in this instant case; Bap NO. EC 89-1796, re motion DMT-2/3. (Among the other matters "dropped" by Judge Russell as no longer needing to be dealt with due to the conversion order, was Weston's motion to approve the update of information in the court-approved disclosure statement, which related to the plan on file, as modified by the current events.)

The third appeal contained in this instant case, BAP NO.EC 89-1816, appealed the order that converted Weston's case to a Chapter 7 one. The motion had been filed by FIMC, joined in by FICAL and Cibula, and at the hearing, Cibula's counsel, McManus, urged Judge Russell to use his prior June 30 Memorandum Decision as the grounds for converting the case. All three of these parties were appellees in pending appeals at the time, with claims which were disputed. The unsecured creditors joined with Weston in opposing the conversion motion, but this was ignored by Judge Russell. The order converting the case was prepared by FIMC's counsel in such a hurry he even got the caption of the case wrong, stating that it was a matter wherein Weston was the moving party against Cibula. (A-86)

Weston timely appealed the conversion order, even though neither she nor

any of the unsecured creditors who had opposed the motion received a copy of the order. Weston's appeal was filed on September 5, 1989, while the order converting the case was filed on August 25, with entry a few days later. On September 14, 1989, Weston filed her statement of issues and designation of record, which had been prepared and served earlier. On September 12, 1989, Judge Russell filed an order directing FIMC's counsel to prepare and file "Findings of Fact and Conclusions of Law" to support the conversion order. (A-88)

The document was prepared by FIMC's counsel and filed on September 27, 1989. It contained the same false statements presented by Judge Russell in his June 30 Memorandum Decision, as well as several made by FIMC's attorneys in earlier filed pleadings, all designed to provide some semblance of justification for the order

converting the case. (A-89 through 97) The Reporter's transcript of the August 22, 1989 hearing, however, clearly demonstrates that the case was being converted because Weston had appealed the orders of Judge Russell, and the case had "gone too long." (A-108, 109)

On appeal, Weston raised various questions as to the lack of jurisdiction for the bankruptcy court to issue orders which impacted upon prior pending appeals as well as arguing that the "Findings and Conclusions" document prepared by counsel for FIMC had been ordered by Judge Russell <u>after</u> he had been divested of jurisdiction over the matter by Weston's timely filed appeal. Weston also cited the fact that the document was riddled with error and utterly false statements. Because the document had been ordered prepared and signed without jurisdiction, Weston argued that it could be given <u>no consideration</u>

by the reviewing BAP Panel. In addition, Weston charged that the actions of Judge Russell in awarding FIMC and FICAL their attorney's fees had violated the due process rights of the unsecured creditors as well as violating Weston's.

The BAP indulged in a little improper procedure of its own. Because the appeal was actually <u>three</u> appealed matters, all of which involved multiple orders and acts by Judge Russell, Weston moved to be allowed to expand the number of pages in her opening brief. It had quickly become apparent to Weston that the 30 pages set by the BAP Rules would hardly provide the necessary pages to fully present the many varied issues, which had been listed in the Statement of Issues filed in each of the appeals. Weston's motion was denied by the single-judge order of BAP Judge BARRY Russell. Pursuant to the provisions of FRBP 8011(e), any action by a single

judge may be reviewed by the pane. As the order was definitely a single-judge order (A-5), Weston moved for panel review of the order, which was denied, again by the same single judge, BARRY RUSSELL. (A-6) Thereafter, Weston was forced to drastically cut down the pages of her opening brief, and had to entirely eliminate some of the issues she had argued.

The BAP Decision of the three consolidated appeals, ignored most of the issues contained in the appeals, and ruled that the bankruptcy court had the jurisdiction to issue the various orders that were the subject of the appeals because Weston had failed to obtain a stay of the orders in the previous appeals and the orders in the instant appeals did not involve proper title to the subject property. (A-16 through 18) The Decision stated that she was referring to her appeal of the settlement with Rodriguez, which had already

been decided, and that Weston was attempting to relitigate those issues. (What was presented on appeal was the fact that none of the pending appeals had been determined at the time the case was converted, as well as providing the back-ground showing the legal question dispute between Judge Russell and Weston.)

The BAP decision also ignored the jurisdictional issues re the "Findings and Conclusions" document, stating that the decision to convert the case was amply supported by the findings of fact and the conclusions of law reached by the bankruptcy court, citing the document prepared by FIMC's counsel and filed on September 27, 1989.

The orders in the first appeal and the third appeal were affirmed by the BAP. The orders in the second appeal involving the awarded attorney's fees were reversed for a very limited purpose, remanding for

the sole purpose of establishing the "reasonableness" of the awarded attorney's fees. Following the denial of her motion for rehearing, Weston appealed to the Ninth Circuit Court of Appeals, which case, 91-15722, was the third and most complex of the matters taken to the Court of Appeals. All three of the related cases; No. 90-16501, No. 91-15360, and the instant case, No. 91-15722, were submitted on the filed briefs to the same Circuit Panel on December 13, 1991.

On February 4, 1992, although this instant case had been the last and most complex appeal taken to the Ninth Circuit Court of appeals, the Circuit Panel filed its decision in the instant case, stating that the issues could be "boiled down" to only two; whether or not the lower court erred in converting the case and awarding the attorney's fees. (A-1 through 4) The Circuit Panel affirmed the BAP decision in

all respects. Weston timely petitioned for rehearing, which was denied by the Circuit Panel without comment. (A-98)

REASONS FOR GRANTING PETITION

The right to appellate review in the judicial process is an important one, and it should not be abridged. It is a right for due process of law guaranteed by the Fifth Amendment of the Constitution, and the Fourteenth Amendment of the Constitution. And a person who is proceeding in the legal system in pro per has the right to expect that the same guarantees will also apply; that the "equal protection of thr law".

In this instant case, Weston's dispute with Judge Russell was over a question of law, i.e., whether or not creditor actions taken prior to her filed notice of appeal re the improper dismissal were in violation of any stay under the Code. This dispute resulted in a continuing

round of orders and subsequent appeals. All Weston was seeking throughout these proceedings was a proper review of the first orders issued in the matter.

It is interesting to note that both BAP Panel and the Ninth Circuit Panel did not refer to this dispute, which was the primary cause of the entire round of pending appeals. Nor has there been any suggestion that Weston's appeals were totally without merit. Instead, much effort is made to justify the various orders which were issued by Judge Russell, culminating in the conversion order. This order was clearly intended to take matters out of Weston's hands and very probably cause the dismissal of the pending appeals..

The BAP Panel and the Ninth Circuit Panel cited the "findings" of the document prepared by counsel for FIMC as being the "extensive findings" of the lower court, amply supported by the record, as grounds

for converting the case. Both the document prepared by FIMC and the June 30, 1989 Memorandum Decision were riddled with many false statements, designed to give credence and support to Judge Russell's acts. There was no "loss and continuing diminution to the estate"; Weston was not paying exorbitant attorney's fees because she was proceeding in pro per, and since the major asset of the estate amply oversecured the mortgagee FICAL, neither that creditor nor its servicing agent FIMC, were impaired. In addition, should she prevail in the appeals, the estate would be increased in assets; a fact which is amply demonstrated in the records of this case.

It would seem that prior to Weston's prevailing in the appeal of the first case dismissal, Judge Russell viewed her efforts with compassion. (A-108) Once she had prevailed, however, which then cast doubts on the orders issued prior to the

BAP decision, (obviously issued with the thought in mind that Weston, being in pro per, did not have much chance of success), Judge Russell began to lose patience with Weston, and his resentment of her appealing his orders began to surface. This is clearly demonstrated in the Memorandum at its "Conclusion". (A-78)

Whether this resentment was conscious or sub-conscious, the fact remains that it was present, and it impacted on Weston's rights for due process. Under the particular circumstances of this case, the prudent course for Judge Russell to have followed was to have <u>postponed</u> issuing any lift-stay orders until <u>after</u> the BAP decided the appeal of the first case dismissal order, BAP No. EC 86-1214. But he did not do this, obviously believing the appeal would be denied, and thereafter, became embroiled in issuing orders in an attempt to defend prior orders issued.

Judge Russell also seemed to have a habit of issuing the orders by entered default, despite the circumstances of the matters involved and the written opposition filed by Weston. The cases still before the District Court demonstrate this, as did the case which was the first appeal taken to the Ninth Circuit Court, Case No. 90-16501. The District Court decision of the case was cited by the BAP Panel in the instant case; Weston v. Rodriguez, 110 B.R. 452 (E.D. Cal. 1989), with the BAP Panel stating that Weston was attempting to re-litigate the issues in that matter. (A-9) As stated supra, what Weston had attempted to present was the fact of the underlying dispute, and that all of her appeals were still pending when her case was converted.

That particular case involved the granting, by default, of the motion filed by Rodriguez seeking court approval of a

settlement agreement with Weston which had been rescinded by Weston. The settlement, reached in January, 1988, gave the home property to Weston, the commercial property to Rodriguez, and dismissed all of the state court litigation. It was contingent, however, upon its not having any adverse effect on the then pending appeal re the first case dismissal, BAP No. EC 86-1214. When Weston discovered that the settlement would "moot" the appeal, she then rescinded the agreement, serving and filing a Notice of Rescission. Rodriguez filed a motion for approval of the settlement, and it was granted by default, despite written opposition by Weston. The default order was entered on April 5, 1988, and on April 8, Rodriguez had the settlement documents recorded, which ultimately forced Weston to have to relocate her retail business, at a large financial loss, and thereafter be subjected to the toxic chemical flood.

On appeal to the District Court, the arguments presented by Weston were that the default order was improper, the act by Rodriguez in recording the settlement documents violated the stay of FRBP 7062, and that under the controlling statute, FRBP 9019, only the trustee or debtor in possession was authorized to bring the motion for approval. All of these arguments were ignored by the District Court, which held that the foreclosure sales of February 24, 1986 had "mooted" all the property issues, and the Appellant could not be granted any relief on appeal. Therefore, it had been "reasonable" for the bankruptcy court to approve the settlement.

Weston moved for rehearing, which was granted, and argued that the validity of the foreclosure sales had been determined by the BAP decision in the appeal, BAP No. EC 86-1214, which obviously held the sales to be invalid, and that this decision had

binding on the bankruptcy court, even if the lower court had ignored it. In its decision on rehearing, the District Court also ignored the BAP decision and its binding effect on the lower court. It held that the only stay in effect following the dismissal order was the ten day stay of FRBP 7062, which had expired prior to the foreclosure sales. The BAP decision and the "law of the case" doctrine which had been argued by Weston on rehearing, was not addressed in the later decision. The original decision was then reconfirmed, and as noted above, this appeal became the first one taken to the Ninth Circuit Court of Appeals, Case No. 90-16501.

As stated supra, the BAP Panel gave little notice to Weston's arguments re the jurisdictional issues she had raised in this appeal. It was forced, however, to recognize the blatant violation of due process committed by Judge Russell in his

awarding FICAL and FIMC their attorney's fees. It played down this violation by concentrating on the issue of the billing statements that had been submitted in camera. The fact that Judge Russell had also "assured" Weston that the issue of the attorney's fees was not being considered at the February 14, 1989 hearing, and also implied that the issue would be considered at a later date, as well as assuring Weston that she would be given an opportunity to examine the in camera documents before he made any ruling on them (A-105 through 107), was not mentioned by the BAP Panel. Instead, the fact that there had been no properly noticed hearing on the issue of attorney fee entitlement under the requirements of § 506(b), was circumvented by the BAP Panel's asserting that Weston "waived" this argument in a verbal exchange with Judge Russell, cited as having occurred at the February 14, 1989 hearing. (A-32)

In her rehearing motion, Weston had pointed out that the quoted comments had been taken out of context, and had been more a lecture by Judge Russell on the rights of a secured party under the Code than anything else. They had not taken place at the February 14, 1989 hearing at all, but occurred at the January 31, 1989 hearing on Weston's two motions, JMW-9 and JMW-10. As stated by Weston in her motion for rehearing, she could not "waive" her rights to due process, and she certainly could not "waive" those rights on behalf of the unsecured creditors. For the BAP Panel to reverse the award of attorney's fees and remand the case for the "sole" purpose of establishing the "reasonableness" of the awarded fees, was akin to putting a band-aid on a mortal wound.

The BAP Panel's failure to address the due process rights violation in a proper manner was condoned by the Ninth

Circuit Panel's decision, which stated that "the record reflects not only that all three deeds of trust held by FIMC and FICAL provided for attorney's fees, but that Debtor had conceded their right to fees at the February 14, 1989 hearing." (A-3, 4) The Ninth Circuit Panel also adopted the BAP Panel's determination of the jurisdictional issues, and stated that the issues on appeal could be "boiled down" to only two; whether or not the bankruptcy court was in error when it converted the case to a Chapter 7, and when it awarded the attorney's fees to FIMC and FICAL, and stated that Weston's arguments about the various appeals were "obviated" by Weston having failed "to obtain a stay of those orders". (A-4) The conversion order was upheld by the Circuit Panel, citing the "extensive and amply supported findings" of the bankruptcy court, quoting the document prepared by FIMC's counsel and filed

on September 27, 1989. (A-2) Weston's arguments than the bankruptcy court lacked the jurisdiction to order and sign that document were not discussed; the Circuit Panel merely stated: "We find no merit to any of Debtor's remaining arguments", and then the Panel affirmed "the BAP's ruling in its entirety...." (A-4)

In adopting the BAP's rulings, the Circuit Panel allowed important questions of law to be unresolved, and condoned all of the improper judicial procedures that had occurred in the proceedings below, including the action of BAP Judge Barry Russell when he denied Weston's motion for panel review of his prior single-judge order by another single-judge order. The actions of Judge Russell severely impeded on Weston's ability to effectively present the various issues in her opening brief, and this fact had been presented on appeal to the Ninth Circuit Court. No mention in

relation to improper judicial procedure is contained in the Circuit Panel's decision, other than the passage that no merit was found in any of "Debtor's remaining argu= ments". As with the BAP, the Circuit Panel's decision failed to address the true jurisdictional issue involved in the consolidated appeals; i.e., to what extent does the bankruptcy court retain jurisdiction to issue subsequent orders in a case following the timely notice of appeal?

Ruling that Judge Russell could issue orders in new proceedings that impacted on the prior appeals because Weston had failed "to obtain a stay" of those prior appealed orders, as did both the BAP and the Ninth Circuit Panel in this case, is in direct conflict with prior Ninth Circuit case law, as set forth in Mullis v. U.S. Bankruptcy Court, Dist. of Nevada, 828 F.2d 1385, 1389 n. 11 (9th Cir. 1987); Bialac v. Harsh Inv. Corp. (In re Bialac),

694 F.2d 625 (9th Cir. 1982); In re Adams Apple Co., 829 F.2d 1484 (9th Cir. 1987); In re Thorp, 655 F.2d 997, 998 (9th Cir. 1981); In re Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977).

As stated by the Court in Mullis, 828 F.2d at 1389 n. 11, a bankruptcy judge who continues to act in a case after an appeal has been filed is acting without jurisdiction. It follows that if the orders appealed in this instant case were issued without jurisdiction, they are void. See Jones v. Giles, 741 F.2d 245 (9th Cir. 1984), (orders issued by a court lacking jurisdiction are void).

The concept that a lower court is divested of jurisdiction upon the filing of an appeal was clearly stated by this Court in Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1986). To what extent the jurisdiction is removed in a bankruptcy case, however, seems to be

somewhat unsettled among the circuits. In the Ninth Circuit case, In re Adams Apple Co., cited supra, the Court stated that the loss of jurisdiction is not to be circumvented by efforts to obtain what would be considered a rehearing by filing various motions. The Third Circuit has stated that the lower court retains only such jurisdiction as will help the appellate court. Main Line Federal Savings & Loan Assn. v. Tri-Kell, Inc., 721 F.2d 904 (3rd Cir. 1983). Other courts have held that the appeal does not bar trying points not involved in the appeal. In re Commodore Corp., 86 B.R. 564 (N.D. Ind. 1988); Home Life Ins. Co. v. Abrams Square II Ltd, 95 B.R. 51 (N.D. Tex. 1988). Although the failure to make adequate findings may result in the remand by the appellate court for such findings, it has been held that once an appeal has been filed, the bankruptcy court may not make or supplement

findings in relation to the orders that had been appealed (as did Judge Russell in the matter of the conversion order). Midwest Properties No. Two v. Big Hill Investment Co., Inc., 93 B.R. 357 (N.D. Tex. 1988).

In the Third Circuit case, Main Line Federal, cited supra, the Court of Appeals held that an order issued by the bankruptcy court after the appeal had been filed, was invalid, because it was not in aid of the appellate process. Another court has recognized that the small residue of jurisdiction retained by the bankruptcy court is limited to preserving the "status quo" of the parties involved. In re Neuman, 67 B.R. 99 (S.D. N.Y. 1986). In another case, the court held that the lower court could award attorney's fees despite the fact that an appeal had been filed. In re Pugh, 72 B.R. 174 (D. Or. 1986), affirmed 821 F.2d 1352 (9th Cir.

1987).

As stated in the beginning of this petition for a writ of certiorari, the statute which apparently governs what orders a bankruptcy judge may issue in a case during the pendency of an appeal, is FRBP 8005, which states in relevant part, that: "the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." (Emphasis added) FRBP 8005, 11 U.S.C. The language of the statute seems fairly clear; it is not ambiguous. The orders should not act the impact upon the rights of the parties involved in the appeal; thus, the status quo should be protected by the bankruptcy court.

Naturally, however, if an order is not stayed following appeal, it may be

enforced by the lower court. See U.S. v. Revie, 834 F.2d 1198 (5th Cir.1987), cert. denied 457 U.S. 1205 (1988). But since the language of FRBP 8005 in relation to what orders may be issued following an appeal is unambiguous, the "plain meaning" rule would seem to apply. This Court recently once again affirmed the concept of this statutory interpretation rule in the case Patterson, Trustee v. Shumate, Case No. 91-913; decided June 15, 1992, Justice Scalia, especially concurring.

In this instant case, the record reflects that Weston has sought a stay of the orders being appealed at every stage of the underlying proceedings, but has been denied such protection by the bankruptcy court, the District Court, the BAP, and even the Ninth Circuit Court. It was not the lack of any stay of prior orders that is involved in this instant case, however, despite the rulings by the BAP

and the Ninth Circuit Panel which are to the contrary. The orders appealed in this case were not ones enforcing any unstayed prior appealed order. The orders being appealed in this instant case were orders entered in new proceedings which impacted adversely on the prior orders; therefore, those orders had not been issued "on such terms as will protect the rights of all parties in interest." FRBP 8005, 11 USC.

In addition, the orders involving the award of attorney's fees were issued in a manner which violated the due process rights of not only Weston, but these of the unsecured creditors as well. Further, in his June 30, 1989 Memorandum Decision, Judge Russell completely changed his prior ruling re the court-approved agreement between FIMC and Weston, which ruling had been contained in the September 6, 1988 orders, and which ruling was already part of the subject matter contained in the

pending appeal of the March 2, 1989 orders, BAP No. EC 89-1256. The bankruptcy court certainly did not retain jurisdiction to change an order already on appeal. See In re O'Connor, 85 B.R. 590 (W.D. Okla. 1987).

In summary, consideration by this Court is necessary on the independent ground that the decision by the Ninth Circuit Panel conflicts squarely with the Ninth Circuit case law cited supra. In addition, there appears to be an unsettled question among the circuits as to exactly what extent a bankruptcy judge can continue to issue orders in a bankruptcy case after a timely notice of appeal has been filed, and the extent to which FRBP 8005 should be considered as controlling, or applied.

The question is of continuing importance; application and interpretation of the Bankruptcy Code should be uniform among the circuits, as well as within the

same circuit. By virtue of these facts, the conflict on this issue should be thus resolved by this Court.

CONCLUSION

Based upon the reasons stated above, the petitioner prays that this Court grant the petition for certiorari, and that a writ of certiorari be issued to review the decision of the Court of Appeals for the Ninth Circuit.

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Order Filed February 4, 1992 in the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:

Weston vs. First Interstate Bank, et al.,

U.S.C.A. Case No. 91-15722

Before: NORRIS, BEEZER, and LEAVY.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel, BAP No. EC-89-1256-RPMe (Russell, Perris and Meyers, Bk. Judges)

JoAnne Weston ("Debtor") appeals pro se from the Bankruptcy Appellate Panel's ("BAP") decision affirming certain rulings of the bankruptcy court. This appeal boils down to essentially two issues, viz., did the bankruptcy court err by (1) converting Debtor's consolidated Chapter 11 cases to a Chapter 7 proceeding, and (2) awarding attorney's fees to certain creditors? We reject her arguments and affirm on all but one point.

A case filed under Chapter 11 may be

converted to a Chapter 7 liquidation, even over the debtor's protests, based on a showing of cause, including:

> (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
>
> (2) inability to effectuate a plan;
>
> (3) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (4) failure to propose a plan under section 1121 of this title within any time fixed by the court[.]

11 U.S.C. § 1112(b)(1)-(4).

Here, the bankruptcy court made extensive and amply supported findings concerning Debtor's inability to make almost any payments to her creditors as well as her unwillingness to take almost any affirmative action in her case despite its having been pending for several years. In light of these considerations, it cannot be said that the bankruptcy court abused its discretion by converting Debtor's consolidated Chapter 11 cases to a proceeding

under Chapter 7. See In re Klein/Ray Broadcasting, 100 Bankr. 509, 511 (Bankr. 9th Cir. 1987).

Debtor's attorney's fee arguments, although somewhat unclear, are equally unavailing. To the extent she complains about the in camera submission of Tobin & Tobin's fee request for its work on behalf of First Interstate Bank of California ("FIBC"), the Bap correctly noted that Tobin & Tobin had failed to meet its burden of demonstrating that the attorney-client privilege applied to its request for fees, and properly remanded for a hearing. We adopt the BAP's ruling on this point.

As for Debtor's contention that neither First Interstate Mortgage Corporation (sic) ("FIMC") nor FIBC had proven their right to fees, the record reflects not only that all three deeds of trust held by FIMC and FIBC provided for attorney's fees,

but that Debtor had conceded their right to fees at the February 14, 1989 hearing.

With respect to Debtor's argument that neither FIMC nor FIBC were entitled to interim fees pending her numerous appeals, the BAP correctly noted that Debtor's failure to obtain a stay of those orders obviates that argument. In line with this point, we note that the bankruptcy court did not grant FIMC and FIBC carte blanche approval of any and all future fee requests; the court simply ruled that those parties were entitled to fees for the work done up to that time, and could continue to submit fee requests in the future for future work as well.

We find no merit to any of Debtor's remaining arguments.

Accordingly, we AFFIRM the BAP's ruling in its entirety, including the remand to the bankruptcy court on the in camera attorney's fee request.

Order Filed April 27, 1990 in the

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

Weston vs. First Interstate Bank, et al.,

BAP No. EC-89-1256, EC-89-1796 & EC-89-1816

(Consolidated)

Before: BARRY RUSSELL, Bankruptcy Judge

The appellant's motion for an extension of time to file her opening brief and two supplements thereto are hereby ORDERED GRANTED. The appellant shall have up to and including May 15, 1990 to file her opening brief.

The appellant's requests for leave to file an over-long brief are hereby ORDERED DENIED. The appellant shall comply with the page limitations set forth in Bankruptcy Appellate Panel Rule 5(b). The opening brief shall not exceed thirty (30) pages in length.

Order Filed May 25, 1990 in the

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

Weston vs. First Interstate Bank, et al.,

BAP No. EC-89-1256, EC-89-1796 & EC-89-1816

(Consolidated)

Before: BARRY RUSSELL, Bankruptcy Judge

The Appellant's Motion for Review of Order Denying Request to Expand Number of Pages in Opening Brief is hereby ORDERED DENIED. It is further ORDERED that the Appellant's Motion for Court to Accept Opening Brief as Being Timely and Correctly Filed is hereby DENIED.

The appellant shall comply with the page limitations set forth in Bankruptcy Appellate Panel Rule 5(b). The opening brief shall not exceed thirty (30) pages in length.

It is so ORDERED.

Order Filed January 10, 1991 in the

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

Weston vs. First Interstate Bank, et al.,

Bap No. EC-89-1256, EC-89-1796 & EC-89-1816

(Consolidated)

Before: RUSSELL, PERRIS and MEYERS, Judges

I. FACTS

The appellant, JoAnne M. Weston (Weston), filed a Chapter 11 petition on March 15, 1985. This is a solvent estate. The primary assets of the estate were two parcels of real property; a commercial parcel and a parcel on which Weston lives that is referred to as the "home property".[1] On January 14, 1986, the bankruptcy court sua sponte dismissed the case and Weston filed a motion for reconsideration on February 19, 1986. That motion was denied on

[1] The home property is 64 acres with a single story home commonly known as 1825 Davis Place Road, Mount Shasta, California. In May 1987 it was appraised at a value of $226,000.

February 27, 1986. Weston then filed a notice of appeal of that order on March 5, 1986. While the appeal was pending, Weston filed a second Chapter 11 petition in October 1986. The order dismissing the first case was vacated by the Bankruptcy Appellate Panel on May 20, 1988.[2] Upon remand, the two cases were consolidated.

After the dismissal of the first petition, on February 24, 1986, creditors Robert & Ferol Rodriguez (the Rodriguezes), foreclosed on the debtor's two real property parcels. Weston entered into a settlement with the Rodriguezes whereby the Rodriguezes quitclaimed their interest in the "home property" parcel and retained the commercial property to which they had obtained title. Weston unsuccessfully attempted to rescind the settlement agreement. She appealed to the District Court which ruled

[2] BAP No. EC-86-1214

against her, holding that the foreclosure sale was valid because no stay was in effect at the time of the sale and that the bankruptcy court properly approved the settlement agreement. In re Weston, 110 Bankr. 452 (E.D.Cal 1989).[3] The appellees in this appeal, First Interstate Bank of California (FICAL), and its servicing agent, First Interstate Mortgage Company (FIMC), are secured creditors.[4] FIMC holds a first deed of trust on the "home property"; FICAL holds the second and third deeds of trust. On November 7, 1988, FICAL filed a motion

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[3] Weston again attempts to litigate these issues already decided decided by the District Court. Weston's motion for reconsideration was granted and the District Court reconfirmed the bankruptcy court's orders. Weston has appealed to the Ninth Circuit and is pursuing a stay pending appeal.

[4] Neither FIMC nor the third appellee in this appeal, Franklin S. Cibula, a law corporation, filed a brief.

for relief from the automatic stay. On January 11, 1989, the court issued an order granting conditional relief from the automatic stay, providing that Weston make monthly payments of $1,200 to FIMC and FICAL to be divided evenly among the three deeds of trust. Weston filed and was granted a motion for reconsideration wherein the monthly payments were reduced to $325 to be applied to the second and third deeds of trust. The order provided that if Weston failed to make a payment, FICAL was to give notice of default with 10 days to cure. If Weston failed to cure the default, then FICAL could file an ex-parte application for relief from the automatic stay.

The order also provided that Weston was to file a proposed plan of reorganization by March 10, 1989 with a provision for payment of all amounts, including reasonable attorney's fees and costs due within

six months of confirmation of the plan. Weston appealed the order granting her motion for reconsideration in BAP NO. EC-89-1256.

FIMC and FICAL filed motions for determination of the amount of their secured claims. On June 30, 1989, the court filed a memorandum decision determining that Weston owed FIMC and FICAL more than $135,000. Since 1985, Weston has made one payment of $4,437.68 to FIMC[5] and two payments of $325 in 1989 pursuant to the court's order. Weston has made no other payments, and thus, remains in default under all three deeds of trust.

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[5] This payment was made in the gap period after her first Chapter 11 case was dismissed and before she had filed her second petition. FIMC refused the partial payments tendered by Weston stating that her bankruptcy was no longer in effect and she would have to pay the total amount due to bring her accounts current.

The court also approved attorney's fees and costs for FIMC and FICAL and directed them to submit appropriate orders. Tobin & Tobin, counsel for FICAL, submitted in camera fee applications. The court approved their request for attoeney's fees of more than $10,000. At the February 14, 1989 hearing, the court assured Weston that she would have the opportunity to look at the fee application before it made any ruling on them. No evidence of any fee applications is before the Panel. Instead, there is a supplemental declaration in support of fees and costs incurred by FICAL. The court's memorandum refers to a declaration and a billing statement in awarding FIMC over $14,000 in fees and costs. Weston appealed the memorandum decision and the two orders approving attorney's fees and costs in BAP NO. EC-89-1796.

FIMC filed a motion to convert the case to Chapter 7 on June 20, 1989 that

was granted on August 29, 1989. In granting this motion, the court ruled that Weston's pending application for approval of modification in her disclosure statement was moot.[6] Weston appealed from this order in BAP NO. EC-89-1816.

FICAL filed a motion for relief from the automatic stay on October 25, 1989. The court granted relief in an order entered November 27, 1989. On February 16, 1990, the bankruptcy court granted Weston's motion to abandon the "home property" to her, thus removing it from the estate. Immediately following this order, Weston filed a motion to vacate the court's order granting FICAL relief from the stay. The court agreed with Weston and vacated the

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[6] The order converting the case to Chapter 7 did render moot Weston's proposed modifications to the disclosure statement. See, e.g., In re Valley Park Group, Inc., 96 Bank. 16 (Bankr. N.D.N.Y. 1989) (conversion to Chapter 7 rendered objections to confirmation of debtor's plan moot).

the November 27, 1989 order granting FICAL relief from the automatic stay to foreclose upon the property and also the May 22, 1989 order granting Weston a 90 day stay of the order requiring Weston to make the monthly payments that are the subject of appeal NO. EC-89-1256.

Following conversion, a Chapter 7 Trustee was appointed and apparently commenced distributing funds to the unsecured creditors. FICAL alleges that there is an excess of $30,000 above the amount necessary to pay the unsecured creditors 100% on their claims. No stay pending appeal of the order converting to Chapter 7 was obtained.

II. ISSUES

1. Whether the court abused its discretion in converting a Chapter 11 case to Chapter 7 where the debtor has failed to file a confirmable plan or show a reasonable likelihood of rehabilitation within

five years of filing a petition.

2. Whether any parts of the appeals from the above orders are rendered moot if the Chapter 7 trustee has distributed a substantial portion of the estate's assets to creditors.

3. Whether the court abused its discretion in awarding attorney's fees and costs to be paid by the debtor where the fee applications were submitted in camera, the applicant did not prove the fee application contained privileged information, and the debtor was denied the opportunity to see the fee applications prior to their approval after being so assured by the court.

4. Whether the bankruptcy court abused its discretion in ordering that FICAL and FIMC had the right to future attorney's fees and costs incurred in this case.

III. STANDARD OF REVIEW

Conversion of a case under 11 U.S.C.

§ 1112(b) is reviewed for an abuse of discretion. In re Klein/Ray Broadcasting, 100 Bankr. 509 (9th Cir. BAP 1987). When an appellate court is unable to grant effective relief, an appeal may be dismissed as moot. In re Cook, 730 F.2d 1324 (9th Cir. 1984). An award of attorney's fees will not be disturbed on appeal unless the Panel finds an abuse of discretion or an erroneous application of the law. In re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985). Findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. Ragsdale v. Haller, 780 F.2d 794 (9th Cir. 1986); Bankr. R. 8013.

IV. DISCUSSION

Weston, the debtor in this case, is appealing from several orders and raises numerous arguments. She has made extensive arguments in her briefs and filed over 800 pages of excerpts detailing the

proceedings in the trial court. Weston contends that by virtue of her appealing an order of the bankruptcy court, the bankruptcy court retains only that jurisdiction as will aid the appellate court. According to Weston's reasoning, it follows that the bankruptcy court may not take any action on the case that is at all related to the matters on appeal. Weston refers to pending appeals in the District Court that deprived the bankruptcy court of jurisdiction to issue the orders that are the subject of this appeal. It appears that Weston is referring to the appeal of the foreclosure sale by the Rodriguezes and the settlement and compromise agreement in her first bankruptcy case. That disposition was published in In re Weston, 110 Bankr. 452)E.D.Cal 1989). Weston apparently believes that all of the pending appeals involve the issue of proper title to the subject property and therefore,

the bankruptcy court may not take any action that would change the status quo. An examination of the orders in this appeal, however, shows that title to the subject property is not an issue.

The bankruptcy court is divested of jurisdiction only as to the same issues that are on appeal. See In re Bialac, 694 F,2d 625 (9th Cir. 1982). If Weston's interpretation of the effect that an appeal renders upon the bankruptcy court's jurisdiction were correct, she would be able to delay any progress in the case and avoid her obligations to her creditors for several years beyond the five years this case has already been pending.

Weston requests that this Panel vacate the order converting the case to Chapter 7 (EC 89-1816), the two orders determining the allowed secured claims of FICAL and awarding attorney's fees (EC89-1796), and the March 2, 1989 order granting the

debtor's motion for reconsideration of motion NO. JMW-10 (EC 89-1256) for lack of jurisdiction.[7] In other words, Weston requests that all of the orders on appeal be vacated and the case be remanded.

A. CONVERSION OF THE CASE TO CHAPTER 7

Section 1112(b) sets forth grounds for conversion of a case to Chapter 7. The court may convert a case only upon a showing of cause. 11 U.S.C. § 1112(b). In converting Weston's case from Chapter

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[7] Weston also requests that this Panel reverse the decision on the debtor's costs on appeal in her first appeal, BAP NO. EC 86-1214 and assess costs against the opposing and losing parties, FIMC and the Rodriguezes. That request is not properly before us. If Weston had wished to seek a reversal of that decision, a motion for rehearing would have been the proper procedure.

Weston also requests that sanctions be imposed on opposing counsel pursuant to Rule 9011 and that all of her contentions be deemed admitted by FICAL due to their alleged failure to address the issues presented in Weston's opening brief. We decline to do either.

11 to Chapter 7, the bankruptcy court made the following conclusions of law:(1) that there is a continuing loss to and diminution of the estate; (2) that there is an absence of a reasonable likelihood of rehabilitation: (3) that the debtor has caused unreasonable delay that has been prejudicial to the creditors and (4) that the debtor has been unable to effectuate a plan of reorganization.

These conclusions were based on the following findings of fact:

> 18. Debtor is unable to pay even the most modest monthly payments of $325 on the two junior deeds of trust.
>
> 19. Debtor's demonstrated inability to meet minimal monthly obligations makes the possibility of qualifying for a residential loan in excess of $135,000 doubtful.
>
> 20. Debtor has taken no affirmative action on her case which has been pending for more than four years other than to file a proposed plan of reorganization and related disclosure statement, to which objections were filed by her major creditors.

21. Debtor has not submitted any evidence of efforts to refinance, liquidate any portion of her property or rezone and parcel her home property.

22. Debtor has made no effort to foreclose on the two deeds of trust she purportedly holds on 40 acres of land in Tehama County even though she has not collected any payments on the underlying notes.

23. Debtor has lost her appeal in the Shasta Terra case, but at least may be entitled to $50,000 of the settlement proceeds. However, debtor is appealing from the settlement even though the settlement is quite advantageous to her.

We have reviewed the detailed record in this appeal. The bankruptcy court's findings of fact are not clearly erroneous. The debtor has had every opportunity to reorganize and failed to do so. "However honest in its efforts the debtor may be, and however sincere its motives, the (bankruptcy court) is not bound to clog its docket with visionary or impractical schemes for resuscitation." Tennessee Pub. Co. v. American Nat. Bank, 299 U.S.

18, 22 (1936). Under the circumstances, conversion of this case to Chapter 7 was not an abuse of discretion by the bankruptcy court.

B. MOOTNESS

Where the failure to obtain a stay pending appeal has "permitted such a comprehensive change in circumstances as to render it inequitable for [a] court to consider the merits of the appeal" basic principles of mootness preclude a reviewing court from claiming jurisdiction. In re Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981). The basic doctrine of mootness restricts the court to adjudication of actual cases and live controversies. Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985). The court is prohibited from rendering advisory opinions. Id.

FICAL alleges that this appeal is moot because "the trustee has already made

significant distributions of assets" but provides no admissible evidence to support this conclusion. FICAL adds nothing in its Motion to Dismiss this appeal which contains the statement in the memorandum of points and authorities that "[a]ll creditors have been or will be paid 100% on their claims" and the statement in the conclusion that there have been distributions of 100% of unsecured claims. (emphasis added). The declaration of Keith A. Kandarian, counsel to FICAL, states that the trustee has abandoned the "home property" to Weston because all of the creditors can be paid 100% on their claims without resort to the equity in the property and that there is more than $30,000 above the funds necessary to pay off all unsecured creditors. There is no declaration by the trustee.

Weston rebuts FICAL's assertion that the trustee has made substantial distribu-

tions to the unsecured creditors. Weston, in her reply brief and in her opposition to FICAL's motion to dismiss, states that the only distribution made by the trustee was a priority payment to "the disputed creditor Cibula" based on a stipulation between Cibula's attorney and the Trustee's attorney. Weston has appealed payment of Cibula's claimed lien to the Bankruptcy Appellate Panel.

We are unable to decide that this appeal is moot on the evidence before us.

C. THE APPEAL OF THE ORDER GRANTING WESTON'S MOTION FOR RECONSIDERATION

The appeal NO. EC 89-1256 from order MCN JMW-10 is an appeal of an order granting Weston's motion for reconsideration. No stay pending appeal was obtained. It is unclear from the intertwined arguments of Weston's briefs exactly what her arguments on appeal are as to this specific order. Weston filed a lengthy statement of issues

on appeal but did not discuss many of those issues in her briefs.

The order granting Weston's motion for reconsideration (1) requested FICAL to file claims for attorney's fees and costs and statements of the amounts claimed due under the first deed of trust; (2) ordered Weston to pay FICAL $325 per month to be applied to the second and third deeds of trust with provisions in the event of default; and (3) directed Weston to file a proposed modified plan of reorganization.

Weston's main concerns appear to be twofold. First, Weston asserts that the bankruptcy court took action without jurisdiction after the appeal from this order was filed. We refer to the above discussion on jurisdiction of the bankruptcy court in a case with pending appeals. Weston feels that she was treated in a biased manner by the bankruptcy court. We have reviewed the record and find no evi-

dence that the bankruptcy court took any biased actions against Weston or in favor of the secured creditors. The record shows that the bankruptcy court has conducted the case in a fair and neutral manner. We are unable to conclude that the court's findings were erroneous and affirm the order appealed from in NO. EC 89-1256.

D. ATTORNEY'S FEES

a. In Camera Fee Information

Weston appeals the court's approval of in camera attorney's fees submitted by Tobin & Tobin, for its representation of FICAL. At the February 14, 1989 hearing, the following colloguy took place:

> MR. ORLICK: Finally, your Honor, would you like the attorney's fees statements we've prepared?
>
> MS. WESTON: And your honor, may I ask why I'm not given a copy, if I might be stuck paying for them?
>
> THE COURT: One of the things that someone can do is request that I look at something without letting the other side look at it. If I find items in here that are confidential, then I

can make arrangements so that you can see --

MS. WESTON: Portions of it?

THE COURT: -- portions of it. And we can perhaps re-describe those matters that are -- that are confidential so that no one is hurt. In other words, you will have an opportunity, I assure you, of looking at these fees before I make any ruling on them.

No further mention of the fact that Tobin & Tobin submitted fees in camera is in the record, Tobin & Tobin completely avoids addressing the issue in its brief.

Fee information is generally not privileged. Tornay v. U.S., 840 F.2d 1424, 1426 (9th Cir. 1988); In re Grand Jury Subpoenas (Hirsch), 803 F.2d 491, 496 (9th Cir. 1986); In re Osterhoudt, 722 F.2d 591, 592 (9th Cir. 1983). "Payment of fees is incidental to the attorney-client relationship, and does not usually involve disclosure of confidential communications arising from the professional relationship." Tornay v. U.S., 840 F.2d at 1426 (citing Hirsch, 803

F.2d at 496; Osterhoudt, 722 F.2d at 593).

The purpose of the attorney-client privilege is to encourage full disclosure of information and enable counsel to render the most effective legal assistance. Tornay v. U.S., 840 F.2d 1424, 1426 (9th Cir. 1988). The attorney-client privilege "protects only those disclosures--necessary to obtain informed legal advice--which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391 (1976).

Tobin & Tobin, as the party asserting the evidentiary privilege has the burden to demonstrate that the privilege applies to the fee information. Hirsch, 803 F.2d at 496 (9th Cir. 1986). There is no evidence in the record that Tobin & Tobin met this burden. Since there is no apparent reason why Weston was denied access to the fee information, we remand for a hearing in which Weston may challenge the reasonableness

of the fees. If the court determines that any fee information is protected by the attorney-client privilege, it may withhold that information. MGIC Indem. corp. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986).

b. Objection to the Allowance of Future Attorney's Fees

Section 506(b) provides oversecured creditors the right to recover attorney's fees. Specifically, § 506(b) provides:

> To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C. § 506(b). Reasonable fees includes reasonable attorney's fees. HR Rep. No. 595, 95th Cong, 1st Sess 356-357 (1977); S. Rep. No. 989, 95th Cong, 2d Sess 68 (1978). The bankruptcy court must assess the reasonableness of requested fees. The court may approve only fees for services actually

rendered. Costs and fees are approved on a retrospective basis.

Weston objects to the orders granting attorney's fees alleging that the court gave "carte blanche" approval by approving future fees not yet incurred. In its memorandum decision of February 14, 1989, the court approved fees of $9,660.64 for FICAL and $14,284 for FIMC and directed counsel to file appropriate orders. The subsequent order granted FICAL attorney's fees of $9,112.32 through 12/31/88 plus "a right to attorney's fees and costs which have accrued since December 31, 1988 and which may be accrued in the future pursuant to 11 U.S.C. § 506(b)." Similarly an order granting FIMC $14,284.56 in attorney's fees through 2/28/89 contained a provision regarding the right to future fees and costs.

Declaring that secured creditors have a right to future attorney's fees and costs

pursuant to § 506(b) is not the same as actually approving fee applications. The orders do not provide that the court is approving any amount that FIMC or FICAL would claim in the future, nor do the orders provide that FIMC and FICAL need not file any further fee information for approval as to the reasonableness of the fees. To the extent that the language of these orders could be interpreted as approving future fees not yet earned or costs not yet incurred, the orders would constitute an abuse of discretion. However, we do not agree with Weston's interpretation of the language on the face of those orders.

c. Weston's Objection to FIMC and FICAL's Entitlement to Attorney's Fees

Weston argues that it was never factually established that FICAL and FIMC were entitled to attorney's fees pursuant to § 506(b). Specifically, Weston claims that it was not shown that the security

agreements provided for fees or that FICAL and FIMC held allowed secured claims. This argument is made in contradiction of her own admission at the February 14, 1989 hearing that FIMC and FICAL were entitled to reasonable fees under the deeds of trust:

> MS. WESTON: I am disputing the law= yer's fees.
>
> THE COURT: Well, you realize that under their Deeds of Trust, so long as they are an oversecured party, which they appear to be in this case, they are entitled to reasonable attorney's fees.
>
> MS. WESTON: Yes sir. Reasonable attorney's fees.
>
> THE COURT: So it seems that our dispute, if any, is in respect to the amount of the attorney's fees.

Weston also devotes much argument to the proposition that FIMC and FICAL were not entitled to be paid any fees until the pending appeals involving the secured creditor were resolved. Weston did not obtain a stay pending appeal of the orders awarding attorney's fees. No case

law is cited in support of the proposition that FIMC and FICAL were not entitled to receive compensation prior to completion of pending appeals. We find this argument unpersuasive.

V. CONCLUSION

The order converting the case to Chapter 7 was not an abuse of discretion and is AFFIRMED. There is no evidence before this Panel showing that the Chapter 7 trustee has made any distribution of assets to creditors in this case. We are unable to determine, therefore, if this presents grounds for mootness in this appeal.

We REVERSE IN PART and REMAND appeal No. EC 89-1796 inasmuch as the court granted attorney's fees based upon applications that were filed *in camera* without a showing by FICAL that the fees contained confidential information. Weston is entitled to a hearing solely for the purpose of

challenging the reasonableness of those fees.

Additionally, we AFFIRM the order appealed in appeal No. EC 89-1256.

Order Filed September 24, 1987

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

Case No. 286-05445-B-11

ORDER APPROVING DISCLOSURE STATEMENT

Before: David E. Russell, Bankruptcy Judge

A Plan of Reorganization and a Disclosure Statement, both dated June 19, 1987, having been filed by the debtor herein, and after notice and a hearing, it having been determined that the Disclosure Statement contained "adequate information" as that term is defined in 11 USC Section 1125, it is

ORDERED:

1. That the Disclosure Statement dated June 19, 1987, be and the same hereby is approved.

(Order prepared and signed by:

DAVID E. RUSSELL, Bankruptcy Judge)

2. That the debtor shall notify the court when she is ready to proceed by filing an application to set a date for the confirmation hearing.

Order Filed September 6, 1988

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE; JOANNE M. WESTON, Debtor

Motion Nos. JMW-3, 4 & 5

Before: David E. Russell, Bankruptcy Judge

The reversal by the Bankruptcy Appellate Panel for the Ninth Circuit of the dismissal of the Debtor's first bankruptcy case (No. 285-00957-D-11) coupled with the Debtor's filing of her second case in this Court (No. 286-05445-B-11) and the events occurring after 1985 have resulted in a tangled state of affairs for all involved parties. Debtor's motions address some of those problems.

After reviewing the files and pleadings in support of and opposing said motions, the Court concludes as follows:

1. First Interstate (the Court, for convenience, refers to the service agent) violated the terms of the stipulation with

the Debtor (approved by this Court on 1/13/86) by refusing to accept the Debtor's 3 tenders of $479.40 each sent to First Interstate in January, February and March 1986. Apparently, the loan representative receiving the tenders was not aware of the stipulation or its terms.

2. The principal balance owed on the promissory note in question is apparently $36,038.92 (see Declaration of C.T. Hux, dated 7/15/88) as of August 1, 1986 (shouldn't it be 1985?) after the last payment made by the Debtor was applied. The monthly payments on the note are $319.60. The Hux Declaration states that there are impound shortages, for taxes and insurance of $8,077.31. No explanation is given, and the Court cannot determine, how the "impound" account is funded.

3. Pursuant to the stipulation between the parties, the 6 months of arrearages from 8/1/85 through January of 1986 equaled

$2,326.66 (6 monthly payments of $319.60 would only total $1,917.60), and the Debtor agreed to pay an additional monthly sum of $159.80 (why this odd amount?) "until said arrearages are fully cured." An additional monthly payment of $155.11 for 15 months would amortize arrearages of $2,326.65.

4. The Court does not have all the "numbers" it considers necessary to determine the amount owed to First Interstate, but it can use the stipulation as a beginning point and note therefrom that late fees, attorneys' fees and foreclosure fees over and above the $409.06 stipulated to by the Debtor shouldn't be assessed against the Debtor, but that the Debtor should pay some interest (there are apparently 3 years of no payments at all). and that First Interstate should be reimbursed for property taxes and appropriate insurance premiums that it paid to protect the property.

5. Debtor misconstrues the paragraph in the promissory note entitled, "Transfer of the Property; Assumption." The paragraph merely recites the typical "due on sale" clause contained in most deeds of trust to protect a lender against unwillingly financing a resale of the property at a time when the prevailing interest rates exceed the interest rate provided for in the note. Such provisions are only enforceable by the lender, if enforceable at all, against the original borrower who executed the note.

6. Sanctions against First Interstate are inappropriate because of the confused nature of these proceedings and because there is no record establishing when and what notice was given to it by the Debtor. It is also quite clear that no automatic stay was in effect in respect to the subject property from January 1986 until May 20, 1988.

7. The automatic stay of 11 U.S.C. § 362(a) is presently in effect in respect to the Debtor's first Chapter 11 case (No. 285-00957-B-11) and is now protecting the subject property.

8. The two bankruptcy cases should be "consolidated" for administrative purposes, although the oldest case (reopened on 7/18/88) is the only viable case at this time (it is axiomatic that only one case can be "open" at any one time in respect to any one debtor).

9. Although the Debtor was successful in appealing the dismissal of her case, she cannot collect her costs on appeal, because the "losing party" was the Court (the motion to dismiss was "sua sponte"), which does not pay for any party's costs.

Good cause appearing therefore,

IT IS ORDERED that Debtor shall pay First Interstate the sum of $480.00 per month commencing on October 1, 1988 until

further order of the Court. The monthly check shall be mailed to James A. Dumas, Jr., Esq. First Interstate shall treat $319.60 of each monthly payment as a payment on principal and interest (i.e., interest to be calculated for one month on the outstanding principal balance), with the remaining $160.40 to be applied to "arrearages", the total of which shall be determined by the Court.

IT IS FURTHER ORDERED that First Interstate shall, within the next 30 days, file a motion to determine the amount of its secured claim. First Interstate shall set the hearing on the motion on the Court's law and motion calendar to be heard no sooner than 20 days after the motion is filed and served on the Debtor. In its motion, First Interstate shall set forth (1) the principal amount owing on the note; (2) the month and year to which interest has been paid; (3) an accounting

setting forth dates, amounts, and descriptions of all sums advanced by it to protect the property; (4) an explanation of the "impound account"; and (5) a proposal for the payment of any "arrearages" found by the Court to be owing to it by Debtor. The Debtor shall file her objections to First Interstate's motion and her suggestions to the Court eight (8) days before the hearing, and First Interstate may reply thereto one day before the hearing.

IT IS FURTHER ORDERED that the two cases above are to be jointly administered under Case No. 285-00957-B-11.

(This Order prepared and signed by DAVID E. RUSSELL, Bankruptcy Judge)

Order Filed on January 11, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

Motion Nos. KAK-1, DMT-2, and JMW-5A (Debtor's Motion for Reconsideration re portions of Orders on prior Motions JMW-3 & 5 and Bill of Costs on Appeal; FICAL's Motion for Relief From Stay; and FIMC's Motion to Determine Amount of Its Claim)

Before: David E. Russell, Bankruptcy Judge

The above-referenced motions came on for hearing December 20, 1988 in the above-entitled court. Debtor appeared, as did Gary H. Gale, esq. of White & Gale, specially appearing for Evans, Dumas & Taron, on behalf of First Interstate Mortgage Company ("FIMC") and Keith A. Kandarian of Tobin & Tobin appeared on behalf of First Interstate Bank of California (FICAL).

The various matters were argued and submitted. The Court hereby makes the

following findings and orders as to the respective motions:

The Court finds that while there is equity in the subject property to protect the interests of the holders of the first, second and third deeds of trust, there is no Plan on file and there are no prospects for immediate payment of arrearages.

The Court further finds that payments to the secured creditors must be made, and believes that the only realistic prospects for the debtor to propose a confirmable plan is for her to sell or refinance the subject property. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that debtor is to make monthly payments of $1,200.00, payable to First Interstate Bank of California, beginning January 10, 1989 and continuing thereafter on the 10th of each month until further order of this Court. Payment is to be made in the form of cashier's checks or

the equivalent and delivered to Keith A. Kandarian, Esq., Tobin & Tobin, One Montgomery Street, 15th Floor, San Francisco, CA 94104 who will collect the payments on behalf of all holders of the first, second and third deeds of trust. Payments are to be distributed $400.00 each to each of the holders of the first, second and third deeds of trust.

Should debtor fail to make payment as directed, counsel for FICAL shall give debtor ten days' written notice to make such payment. If such payment is not forthcoming within such ten day period, FICAL may submit an ex parte declaration and application for an order terminating the stay with respect to the subject property as to all deed of trust holders without a further hearing.

FIMC and FICAL are to file statements as to amounts owed under their respective deeds of trust prior to a hearing thereon

scheduled for February 14, 1989 at 2:00 p.m., notice to be given by counsel for FIMC.

Debtor shall file a Disclosure Statement and Proposed Plan no later than February 20, 1989, and must set a hearing as to the adequacy of the Disclosure Statement within 30 days thereafter. March 15, 1989 is the date scheduled for hearings on disclosure statements during the month of March, 1989; Debtor shall therefore arrange for a hearing on her disclosure statement for March 15, 1989.

(This Order prepared by counsel for FICAL and signed by Judge Russell.)

Order Filed on March 2, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

ORDER GRANTING DEBTOR'S

MOTION FOR RECONSIDERATION

(MCN: JMW-10)

Before: David E. Russell, Bankruptcy Judge

The above-referenced Motion for Reconsideration came on regularly for hearing January 31, 1989 in the above-entitled court, the Honorable David E. Russell, United States Bankruptcy Judge, presiding. The debtor and moving party herein, JoAnne M. Weston, appeared in pro per, with Keith A. Kandarian of Tobin & Tobin appearing on behalf of the secured creditor FIRST INTERSTATE BANK OF CALIFORNIA..

The debtor's Motion for Reconsideration referred to the Orders first issued by the Court orally on December 20, 1989, then reduced to writing and signed by the

Honorable David E. Russell on January 11, 1989, with entry on the docket January 17, 1989.

These orders related to the prior Motion Nos. JMW-3, JMW-5, JMW-3A, JMW-5A, KAK-1, and DMT-2, all of which had been continued to December 20, 1988 for hearing. However, the filed Orders referred only to Motion Nos. KAK-1, DMT-2, and JMW-5A.

After fully considering the debtor's Motion for Reconsideration, the papers, records and files herein, having heard the various arguments presented in support of and in opposition to the Motion, and being fully advised in the premises, the Court finds that good cause exists for the Motion to be granted, and hereby makes the following findings and orders.

The Court finds that there is ample equity in the subject property to protect the interests of the beneficiaries of the first, second and third deeds of trust on

the subject property. However, the Court desires that the debtor make some form of monthly payment on the second and third trust deed balances which are not in dispute.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The prior Orders issued at the December 20, 1988 hearing and subsequently entered on the docket January 17, 1989 in relation to Motion Nos. KAK-1, DMT-2 and JMW-3A, are hereby modified as follows:

2. The secured creditor, FIRST INTERSTATE BANK OF CALIFORNIA, shall file statements with the Court as to the amounts it claims are due for attorneys fees and costs incurred under the second and third deeds of trust on the subject property. The servicing agent for FIRST INTERSTATE BANK OF CALIFORNIA, First Interstate Mortgage Company, shall file itemized statements as to the amounts claimed due under the first

deed of trust.

3. The foregoing itemized statements shall be filed with the Court prior to the February 14, 1989 hearing thereon, with the Notice to be given by counsel for First Interstate Mortgage Company.

4. Debtor is to make monthly payments in the amount of $325, payable to FIRST INTERSTATE BANK OF CALIFORNIA, which are to be applied to the balances due under the second and third deeds of trust on the subject property. Payment is to be sent to the counsel for the secured creditor, Keith A. Kandarian, Tobin & Tobin, One Montgomery Street, Fifteenth Floor, San Francisco, CA 94104. The first monthly payment is due March 1, 1989, continuing thereafter on the first of each month until further order of the Court. Should debtor fail to make any such monthly payment timely, the counsel for FIRST INTERSTATE BANK OF CALIFORNIA shall give debtor

written notice of said default, with ten days to cure same. If said default is not cured within such ten day period, counsel may submit a declaration and application for Ex Parte Relief from Stay for this Court's consideration.

5. Debtor shall file her proposed Modified Plan of Reorganization by March 15, 1989 and is directed by the Court to provide in the Plan for payments of all amounts, including reasonable attorneys' fees and costs, due under the trust deeds on the subject property within six months of confirmation of said Plan. Hearing on the proposed modification of the Disclosure Statement will be noticed by the debtor for March 15, 1989 with the Confirmation Hearing on the Modified Plan of Reorganization set for April 17, 1989.

(This Order prepared by counsel for FICAL and signed by Judge Russell.)

Order filed April 12, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

ORDER DENYING STAY PENDING APPEAL

(Re: Motion No. JMW-10)

Debtor JOANNE M. WESTON has submitted an ex parte motion for a stay pending her appeal from the court's order of March 2, 1989 (3/2/89 Order) which granted her Motion for Reconsideration (Motion No. JMW-10). Since the court cannot read the Debtor's mind, it can only presume what the Debtor's concerns are based upon the Debtor's statements and arguments in her motion.

Preliminarily, the court notes that the Debtor is apparently not directly attacking the monthly payments of $325.00 which the 3/2/89 Order requires her to make to First Interstate Bank commencing on March 1, 1989, although she does argue

in paragraph 5 of her motion that United Savings Ass'n v. Timbers of Inwood Forrest, 484 U.S.___, 108 S.Ct. 626, 98 L.E.2d 740 (1988) prohibits such payments to over-secured creditors. However, the Debtor fails to comprehend the consequences implicit in that decision for debtors such as her who have not proposed a feasible reorganization plan within a reasonable period of time. Congress gave Chapter 11 debtors an exclusive period of four months to propose their plans, and the courts have been quite liberal in permitting debtors additional time to propose plans after the exclusivity period. And, while this court is aware of and sympathetic to the problems faced by this pro se Debtor, it has concluded that since the Debtor is now starting her fifth year in this court, she has failed to meet the reasonable time requirement for proposing a feasible plan of reorganization required by the Timbers

court. Her case is ripe for dismissal or conversion, as well as termination of the automatic stay. While the $325.00 per month may not be necessary to adequately protect First Interstate since they are oversecured, nevertheless, the payment can be granted for cause, such as unreasonable delay and the continual erosion of the equity in the property to the detriment of the unsecured creditors, both of which exist in this case. The court specifically inquired as to the monthly amount the Debtor could afford to pay, and upon being satisfied that she could afford $325.00, the court reduced the amount of $1,200.00 previously ordered to the affordable amount. Considering the alternatives, the court has, contrary to Debtor's comments, been much more considerate to the Debtor than to her creditors.

Apparently, the Debtor's primary reason for appealing the 3/2/89 Order is that

the court did not sign her proposed order, but signed the revised order prepared by counsel for First Interstate. Her objection to the 3/2/89 Order is that it entirely eliminated any reference to her pending appeals and added the requirement that First Interstate be paid in full within six months of plan confirmation. Apparently the Debtor is under the misapprehension that the failure to include any reference to her pending appeals in the 3/2/89 Order jeopardizes those appeals. In this regard, she is just plain wrong. The appeals are completely irrelevant to the 3/2/89 Order and the recitation of them in the Order would needlessly complicate it. The appeals are not jeopardized in any way; they will either be heard in due course or be dismissed as moot. The real danger to the Debtor is her continued failure to deal with her creditors in a practical manner. Had she done so at the

beginning of the case, she could have had a confirmed plan and her creditors satisfied by now. The purpose of ordering the Debtor to satisfy First Interstate within six months of confirmation was to impress upon her the importance of treating that creditor fairly in her plan. If she cannot afford to pay them more than $325.00 per month, she cannot propose a feasible long term payment plan to satisfy their claims. She must therefore adopt a more practical approach, such as refinancing or selling some of her property. This court will, of course, consider any feasible alternative proposed in her plan, even if it is not in strict compliance with the 3/2/89 Order.

Since the Debtor has little prospect of prevailing on an appeal of an order in her favor, and because a stay would be more detrimental to the creditors rather than to the Debtor, her motion for a stay

pending appeal is HEREBY DENIED.

Order prepared and signed by:

DAVID E. RUSSELL

JUDGE, UNITED STATES BANKRUPTCY COURT

Order filed May 22, 1989

Granting Motion for Stay of Order

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

(Order re MCN: JMW-10)

On May 8, 1989, the Debtor herein, JoAnne M. Weston, filed an Ex-Parte Motion with this Court for Stay of Order. The requested stay referred to the Court's Order orally issued on January 31, 1989, which required the Debtor to make monthly mortgage payments of $325.00. Copies of the Ex-Parte Motion having been served on the other parties in interest, and good cause appearing after consideration thereof, it is

ORDERED that the aforesaid motion be and the same is hereby GRANTED, and the aforesaid January 31, 1989 Order re the monthly payments is hereby STAYED for a period of ninety days. It is further

decreed that if the Debtor requires a longer stay, she may apply ex-parte to the Court for such extension as is necessary following the ninety days.

Dated May 22, 1989

Signed by David E. Russell,

United States Bankruptcy Judge

MEMORANDUM DECISION

Filed on June 30, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

Motion No. DMT-03 (Filed as DMT-02)

Heard on February 14, 1989

Before: David E. Russell, Bankruptcy Judge

The Debtor has her residence at 1825 Davis Place Road in Mount Shasta, Caliornia ("the property"). The property contains approximately 64 acres improved with a single story house of approximately 2,017 square feet together with a carport and miscellaneous outbuildings. In May of 1987 the property was appraised at a value of $226,000.00.

Three deeds of trust encumber the property, all of which were recorded prior to the filing of the Debtor's petition herein in March of 1985. As will be shown hereinafter the total amount due on all of

the promissory notes secured by the deeds of trust is substantially less than the appraised value of the property. The Debtor disputes the amounts claimed as due under the promissory notes in question and the motion presently before the court was filed to determine the amounts of the three secured claims against the property.

PRELIMINARY MATTERS

In her objection to Motion filed herein on November 29, 1988, the Debtor devotes the first six paragraphs thereof to the failure of First Interstate Mortgage Company (FIMC) (the servicing agent for first deed of trust beneficiaries) to honor a stipulation entered into in January 1986[1] which provided for the payment of the arrearages due on the underlying promissory note by the Debtor in monthly

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[1] The stipulation is not in the court's files, and the court is unable to determine when it was executed.

installments. The letter of February 4, 1986 from FIMC's then attorney, Eve T. Contente to the Debtor's then attorney, Carol Arlin (attached to the Debtor's Objection to Motion as Exhibit A) now makes it clear to the court that FIMC repudiated the stipulation because the stipulation was executed after this case was dismissed by Judge Dahl[2]. The Debtor argues that FIMC's refusal to accept the first few monthly installments tendered by the Debtor pursuant to the stipulation extinguishes her obligation to pay the arrearages (and perhaps the entire sum due under the promissory note).

In support of her position that her

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[2] Judge Dahl's order was signed on January 2, 1986 but wasn't entered on the docket until January 14, 1986. After the Debtor's motion for reconsideration (filed on January 17, 1986) was denied by Judge Dahl on February 24, 1986, the Debtor appealed. The Bankruptcy Appellate Panel reversed the Order of Dismissal and remanded the case on May 20, 1988.

obligation is extinguished, the Debtor cites California Civil Code (C.C.) §§ 1476, 1512 and 1524, which are inapplicable to an obligation to pay money, which is the specific obligation owed by Debtor to FIMC's principals. An obligation to pay money is extinguished as provided for in C.C. § 1500; namely, the money must be deposited in a bank or savings or loan in the name of the creditor with notice thereof to the creditor. Had the Debtor utilized her proper remedy and continued to make the subsequent monthly payments in accordance with C.C. § 1500 and the stipulation (see Exhibit F to her Objection to Motion) she might not have been in default on the first deed of trust. But she did not, and she is seriously delinquent and in default.

Equally unfortunate for the Debtor is that this court cannot find that the position FIMC took in respect to the

stipulation in February 1986 is unreasonable. Under California law a deed of trust beneficiary is not required to accept monthly installments from a debtor for arrearages and the stipulation, entered into in respect to a motion for relief from stay in the Bankruptcy Court, at least arguably, was not enforceable by any court when the bankruptcy case was dismissed. Sanctions would therefore be inappropriate and any reasonable attorney's fees incurred by FIMC in respect to the stipulation and the subsequent dispute over it are chargeable to the Debtor because of 11 U.S.C. § 506(b).

The Debtor would have this court deny FIMC its fees and costs itemized below on the grounds that FIMC "breached" the "settlement agreement" of January 1986, violated the automatic stay for its actions after January 1986 and before the Debtor filed her second bankruptcy petition in

October of 1986. She also contends that the inconsistent statements in FIMC's Declarations about the true beneficiary of the deed of trust and owner of the underlying promissory note are grounds for imposing sanctions against FIMC. Finally, she contends that FIMC is not the real party in interest because it has finally clarified the "confusion" by admitting that it is the servicing agent for First Interstate Bank and the Federal Home Loan Mortgage Corporation. The major problem with the Debtor's arguments is that she conveniently overlooks her duty and obligation to pay the note secured by the deed of trust. There is nothing in the Bankruptcy Code that prohibits a servicing agent, such as FIMC, from representing its principals in the Bankruptcy Court, and the confusion of its attorneys as to the interrelationship of it with its principals should not be grounds for

denying it its otherwise legitimate fees and costs. In other words, the Chapter 11 provides the Debtor a "breathing spell" to reorganize so that she can pay her debts; it does not extinguish those debts, nor does it prohibit creditors from protecting their rights. In the case of oversecured creditors, they may be stopped from foreclosing, but because of § 506(b) all of their reasonable expenses will be chargeable against their collateral.

Since the value of the property exceeds the indebtedness against it represented by the deeds of trust, all three claims are "allowed secured claims" as provided in 11 U.S.C. § 506(a). As such, 11 U.S.C. § 506(b) provides that the beneficiaries of the three deeds of trust are entitled to all interest on their claims and any reasonable fees, costs or charges provided for under the notes and deeds of trust, including, of course, fees, costs

and charges incurred in protecting their rights in the Bankruptcy Court. The practical effect of this provision of the Bankruptcy Code is that if the Debtor is to save the property she must pay for any delays in making payment on the notes (in the form of increased interest) and must pay all reasonable attorneys' fees and costs incurred by the deed of trust beneficiaries in bringing or resisting motions and protecting their rights on appeal. To date, as will be shown below, those fees are significant and will undoubtedly increase substantially unless the Debtor resolves her problems.

FIRST DEED OF TRUST

In order to determine the amount of principal and interest due on the underlying promissory note, we start with the amortization schedule attached as Exhibit A to the Supplemental Declaration of C.T. Hux filed herein on March 9, 1989

Apparently both parties agree that the Debtor was current for the first 92 payments covering the period from July 1, 1977 through February 1, 1985. The principal amount due after the February 1985 payment according to the schedule was $36,883.63. After Debtor filed her petition herein in March of 1985, her March, April and May payments were late but were accompanied with the appropriate late charge of $12.78. She made her June 1985 payment on time. The principal balance thus due after that payment was $36,694.29 (accord, paragraph 4 of Hux Declaration). On July 31, 1986[3] Debtor paid $4,437.68 to FIMC. The court notes that the amount applied by FIMC to late charges, according to paragraph 4 of the Hux Declaration was $282.88, or 13 late charges of $21.76

[3] At this point in time, the Order of Dismissal of this case was on appeal and the Debtor had not yet filed her second petition.

each rather $12.76 as previously charged. No explanation is given as to why the late charge was increased. On the other hand, no late charge was imposed for the August 1986 payment which was not made until November 23, 1988. Absent any objection from the Debtor, the court accepts the principal balance of $35,985.86 as the correct principal amount due as of 8/31.86.

Interest on that balance is calculated at the rate set forth in the underlying note, which is 8.875% per annum, or $3,193.745 per year. Interest for 3 years, or through the August 1989 installment due date, would be $9,581.24. Interest for one day would be $3,193.745 divided by 365, or $8.7499863 (which could be rounded off to $8.75), rather than the $8.87 stated in paragraph 6 of the Hux Declaration.

Debtor does object to the $3,595.38 paid by FIMC in May and June of 1988 to the county of Siskiyou for real property

taxes on the subject property. Attached as Exhibit G to her Objection to Motion is an uncertified copy of a document entitled "Abstract of Delinquent Property Taxes and Certificate of Redemption" which purportedly relates to the subject property. The copy provided to the court is somewhat blurred, but it appears that it only covers the taxes due on the property on December 10, 1985 (the sum of $527.59) and on April 10 and December 10, 1986 (the total sum of $1,115.74). The first sum is the same as paid by FIMC on 5/18/88 and the second sum is the same as paid by FIMC on 5/23/88. It is most likely that the $1,229.08 paid by FIMC on 5/25.88 was for the 1987 taxes (plus penalties?) and the $590.07 paid by FIMC on 6/14/88 was for penalties (164.31), interest ($390.76), costs ($20.00) and redemption fee ($15.00) on the 1985 and 1986 taxes. There is no explanation for the 5/26/88 payment by FIMC

in the amount of $132.90. The Debtor is right in one respect; FIMC should provide additional detail to back up the propriety of its claimed tax payments. In any event, the Debtor doesn't claim that she paid any taxes since April of 1985, and she is the one who must pay those taxes.

FIMC claims that it has paid attorneys' fees and costs of $4,072.00[4] and has incurred additional fees and costs of $11,871.81[5] for a total of $15,943.31 (corrected by 50 cents) through 2/28/89. The court notes that KAW (Karen Ann Widess?) charged $165.00 an hour in November and December of 1988 for 19.45 hours, but only

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4 Declaration of Alex Campbell filed herein on 2/10/89. The supplemental Declaration of C.T. Hux at pg. 5 line showing $4,261.25 paid for fees with a credit of $94.50 (on line 12) is apparently in error.

5 The billing statement of 2/28/89 of Evans, Dumas & Taron carries forward $9,777.24 from the previous billing of 1/31/89 which showed a balance of $9,776.74. The balance of 2/28/89 is thus 50 cents too high.

charged $90.00 an hour for her time in January and February 1989. At $75.00 an hour, FIMC was overcharged $1,458.75 in 1988. Also, this court does not approve charging travel time in excess of $50.00, so that the 2/14/89 charge for 8 hours by KAW should be reduced by $40.00 an hour ($90.00 less $50.00) for 5 hours or $200.00. This gives us an adjusted total of $14,284.56 after making the above two corrections. While fees and costs of over $14,000.00 appears high for two motions, (Relief from Stay and to Determine Amount of Secured Claim), FIMC's attorneys have had to respond to the Debtor's oppositions, appeals and motions for reconsideration. The hourly rates of $90.00 or less charged by FIMC's attorneys are clearly reasonable and the court finds that the hours spent are also reasonable. Thus, the revised total of $14,284.56 in attorneys' fees and costs are properly chargeable against

the Debtor under 11 U.S.C. § 506(b).

In summary, the Debtor owes the following amounts to FIMC on the first deed of trust:

Principal	$35,985.86
Interest (through 8/31/89)	9,581.24
Property taxes (through 1987?)	3,595.38
Attorney's Fees (through 2/28/89)	14,284.56
Foreclosure Fees	1,015.76
Property Inspection Fees	120.75
Total	$64,583.55

Additional attorney's fees, property taxes and other charges will undoubtedly be due by August 31, 1989. Thus, on an original obligation of $40,000.00 the Debtor now owes in excess of $65,000.00.

SECOND DEED OF TRUST

The second deed of trust secures a promissory note executed by the Debtor on September 11, 1978 for the principal amount of $24,500.00 with an interest rate

of 12% per annum. The original payee was United California Bank which was subsequently merged into First Interstate Bank of California (FICAL), the present holder of the note. The Declaration of Andrea Banduhn in support of Motion No. KAK-1 filed herein on November 4, 1988 states that the principal amount owed on this note as of July 15, 1985 was $19,715.59. Interest at 12% for one year on the principal balance is $2,365.87. Interest through July 15, 1989 is 4 x $2,365.87 or $9,463.48. Interest for one month on the principal balance would be 1% or $197.16.

FICAL is also the holder of the third deed of trust on the property. Since FICAL has been represented by TOBIN & Tobin throughout these proceedings in respect to both deeds of trust and their fees have not been allocated, the court will treat them, for the sake of convenience, as properly attributable to the

note secured by the second deed of trust. Attorney's fees charged by Tobin & Tobin to FICAL through December 31, 1988 totaled $10,197.50 with costs of $234.82. Mr. Kandarian of Tobin & Tobin, whose offices are in San Francisco, attended hearings in this court on 7/26/88, 10/25/88, 11/29/88 and 12/28/88 and apparently charged his regular hourly rates for travel time, which the court estimates takes at least three hours for a round trip. Thus, 12 hours of travel time multiplied by the excess of his hourly rate over the $50.00 per hour for travel time permitted by this court equals an overcharge of $1,320.00 ($160.00 less $50.00 times 12). The adjusted total of fees and costs for Tobin & Tobin through 12/31/88 is therefore $9,112.32.

In summary, the total amounts owed by the Debtor on the second deed of trust are:

Principal	$19,715.59
Interest (through 8/15/89)	9,660.64

Attorney's Fees & Costs (through 12/31/88)	$ 9,112.32
Total	$38,488.55

Additional attorney's fees and costs have obviously accrued since 12/31/88, so that the Debtor now owes in excess of $40,000.00 (assuming all attorney's fees are attributable thereto) on an original obligation of $24,500.00.

THIRD DEED OF TRUST

Determining the total due on the third deed of trust held by FICAL is simple, once consideration of attorney's fees is removed. The Debtor has reduced the principal balance on the underlying note to $11,800.00. It is dated November 20, 1979 and bears interest of 16.75% per annum and has been due and payable in full since June 26, 1980. Interest thereon is $1,976.50 per year. Through June 26, 1989 this interest therefore amounts to $17,788.50 and accrues at the rate of $164.71 per month thereafter. Foreclosure charges,

according to Ms. Banduhn, are $690.00.

In summary, the Debtor owes the following amount on the third deed of trust:

Principal	$11,800.00
Interest (through 8/26/89)	18,117.92
Foreclosure Costs	690.00
Total	$30,607.92

CONCLUSION

The Debtor is apparently determined to appeal every order of this court that is not "picture perfect" by her standards. She will undoubtedly appeal this decision as well. But even if she should be fortunate enough to prevail upon any conceivable grounds, it will be a Pyrric victory, because she will undoubtedly lose her home property in the process. As shown above, she owes FIBC and FICAL in excess of $135,000.00 (with the addition of attorney's fees accrued after the dates indicated above) and she has stated in her application for temporary stay pending

appeal filed herein on May 5, 1989 that she is unable to pay even the modest monthly amount of $325.00 on the three deeds of trust. With her modest income, it is doubtful that the Debtor could qualify for a residential loan in excess of $30,000.00. Thus her prospects for re=financing the property are nil. Her only hope is to liquidate her remaining properties for enough to reduce the existing liens on her home property to a manageable amount.

Although four years have gone by she filed her petition herein, the Debtor has taken no affirmative action on her case other than to file a proposed plan of reorganization and related disclosure statement. She has not liquidated any property nor has she rezoned her home property. She has made no effort to forclose on the two deeds of trust she purportedly holds on 40 acres of land in Tehama County even

though she hasn't collected any payments on the inderlying notes (she has stated to the court that she doesn't even have copies of the notes!). She has lost her appeal in the Shasta Terra case, but at least she is entitled to maybe $50,000.00 of the settlement proceeds. She is appealing from the settlement in the Rodriguez matter, even though that settlement appears quite advantageous to her. Judging from her posture throughout this case of all defense and no offense, her prospects of obtaining practical solutions in respect to her other properties are rapidly dimming, although some prompt, practical action on her part might still salvage at least the home property for her benefit.

In the meantime, interest and attorney's fees continue to accrue on the home property and will escalate upon her appeal of this decision. Her "point of no

return" has been reached.

Attorneys for FIBC and FICAL will prepare and submit proposed orders consistent with this memorandum decision.

Dated: June 30, 1989

(Prepared and signed by:)

DAVID E. RUSSELL

JUDGE, UNITED STATES BANKRUPTCY COURT

Order filed July 18, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

Motion No. DMT-03 (Filed as DMT-02)

Heard on February 14, 1989

Before: David E. Russell, Bankruptcy Judge

(Prepared by counsel for FICAL)

The motion of JOANNE M. WESTON, dba WESTON ENTERPRISES, the above-named debtor, for determination of secured status of the claim held by FIRST INTERSTATE BANK OF CALIFORNIA, having been duly argued and submitted, the Court having filed its Memorandum Decision June 30, 1989.

IT IS ORDERED, ADJUDGED AND DECREED:

1. As to the Second Deed of Trust obligation held by FIRST INTERSTATE BANK OF CALIFORNIA (formerly known as United California Bank), dated September 11, 1978 for the principal amount of $24,500.00, the following amount is determined to be an

allowed secured claim:

Principal	$19,715.59
Interest (through 8/15/89)	9,660.64
Attorneys' fees & Costs (through 12/31/89)	9,112.32
TOTAL	$38,488.55

2. As to the Third Deed of Trust obligation held by FIRST INTERSTATE BANK OF CALIFORNIA ("FICAL"), dated November 20, 1979 in the principal sum of $11,800.00, the following amount is determined to be an allowed secured claim:

Principal	$11,800.00
Interest (through 8/15/89)	18,117.92
Forclosure costs	690.00
TOTAL	$30,607.92

3. IT IS FURTHER ORDERED that FICAL shall have a right to attorneys' fees and costs which have accrued since December 31, 1988 and which may be accrued in the future pursuant to 11 U.S.C. 506(b).[sic]

Dated July 18, 1989 and signed by:

DAVID E. RUSSELL
Judge, United States
Bankruptcy Court

Order Filed July 31, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

Motion No. DMT-03 (Filed as DMT-02)

Heard on February 14, 1989

Before: David E. Russell, Bankruptcy Judge

(Prepared by counsel for FIMC)

The motion of Joanne M. Weston, dba Weston Enterprises, the above-named debtor, for determination of secured status of the claims held by First Interstate Bank of California, having been duly argued and submitted, the Court having filed its Memorandum Decision June 30, 1989.

IT IS ORDERED, ADJUDGED AND DECREED:

1. As to the First Deed of Trust obligation held by First Interstate Bank of California (formerly known as United California Bank), and serviced by First Interstate Mortgage Co. ("FIMC"), for the principal amount of $40,000.00, the following

amount is determined to be an allowed secured claim:

Principal	$35,985.86
Interest (through 8/31/89	9,581.24
Attorneys' Fees (through 2/28/89)	14,284.56
Property Inspection Fees	120.75
Property taxes (through 1988)	3,595.38
Foreclosure Fees	1,015.76
TOTAL	$64,583.55

2. IT IS FURTHER ORDERED that FIMC shall have a right to attorneys' fees and costs, property taxes and other charges which have accrued since February 28, 1989 and which may be accrued in the future pursuant to 11 U.S.C. 506(b). [sic]

Dated July 31, 1989 and signed by:

DAVID E. RUSSELL

United States Bankruptcy Court

Order Filed on August 25, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

(Caption of Matter in Error)

(Weston vs. Franklin S. Cibula, et al.)

Motion No. DMT-4

(Motion to Convert Case to Chapter 7)

Heard on August 22, 1989

Before: David E. Russell, Bankruptcy Judge

(Prepared by counsel for FIMC)

ORDER CONVERTING CASE TO CHAPTER 7

The motion of First Interstate Mortgage Company, joined by First Interstate Bank of California, requesting an order converting this Chapter 11 case to one under Chapter 7, came on for hearing before the court on August 22, 1989, at 2:00 p.m., the Honorable David E. Russell, presiding. Joanne M. Weston, the debtor-in-possession, appeared in pro per, Michael S. McManus,of Diepenbrock, Wulff, Plant &

Hannegan appeared on behalf of creditor, Franklin S. Cibula, a Law Corporation, Richard Malatt of Dumas & Taron appeared on behalf of First Interstate Mortgage Company and Keith A. Kandarian of Tobin & Tobin appeared on behalf of the joint moving party, First Interstate Bank of California. The court having considered the pleadings filed on behalf of all parties and the arguments of counsel, makes the following order:

IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Chapter 11, Case No.285-00957-B-11, consolidated with 286-05445-B-11, entitled Joanne M. Weston, dba Weston Enterprises is hereby converted to a case under Chapter 7 of the Bankruptcy Code. The appointment of a trustee shall be made forthwith.

Dated August 25, 1989 and signed by:

DAVID E. RUSSELL

United States Bankruptcy Judge

Order Filed on Sptember 12, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

(Issued by Judge Russell re MCN: DMT-4)

ORDER TO PREPARE AND FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

It appearing to the Court that the above-entitled matter/motion on which the Court has heretofore ruled is one in which Findings of Fact and Conclusions of Law would be appropriate, now therefore, it is

ORDERED that EVANS, DUMAS & TARON (KAREN ANN WIDESS, ESQ.) submit such Findings of Fact and Conclusions of Law on or before ten (10) days from this date.

Dated September 12, 1989 and signed:

DAVID E. RUSSELL

JUDGE, U.S. BANKRUPTCY COURT

Document filed September 27, 1989

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: JOANNE M. WESTON, Debtor

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RE MCN: DMT-4

Heard August 22, 1989

Before: David E. Russell, Bankruptcy Judge

(Prepared by counsel for FIMC)

FIRST INTERSTATE MORTGAGE COMPANY ("FIMC"), a California corporation ("Moving Party"), submits the following findings of fact and conclusions of law on the motion to convert the within case to Chapter 7, heard August 22, 1989, pursuant to the Order to Prepare and File Findings of Fact and Conclusions of Law filed September 12, 1989.

FINDINGS OF FACT

1. The debtor filed a Chapter 11 petition, Case No. 2-85-00957-D-11, on March 15, 1985. That case was dismissed

by court order entered on January 14, 1986.

2. Debtor appealed the trial court's dismissal order and filed a second Chapter 11 petition while her appeal of the dismissal order was pending.

3. On May 20, 1988, the Bankruptcy Appellate Panel overturned the January 14, 1986 dismissal order, and reinstated the first Chapter 11 bankruptcy.

4. On remand, the trial court consolidated the 1985 Chapter 11 case with the 1986 Chapter 11 case.

5. In or about February, 1986, the holders of a junior deed of trust, Robert and Ferol Rodriguez, held a foreclosure sale on the real property commonly known as Route 1, Box 487, Mt. Shasta, California 90067-9736, and which included the property known as 1825 Davis Place Road.

6. On or about June 26, 1987 an order was rendered and subsequently entered on July 6, 1987, on Motion HSM-1 whereby it

was determined that the Route 1, Box 487, Mt. Shasta, California property was no longer part of the estate.

7. The debtor filed an appeal of the July 6, 1987 order. The court's order was upheld on appeal.

8. On April 5, 1988, the court approved a settlement agreement between debtor the [sic] Rodriguezes whereby the debtor's residence, 1825 Davis Place Road, was conveyed to the debtor and the Rodriguezes retained title to the real property known as Route 1, Box 497.

9. In August 1987, First Interstate Mortgage Company ("FIMC") filed a Motion for Relief From Stay, Motion No. DTM-1. On September 15, 1987, this court granted the Motion for Relief From Stay. On October 13, 1987, the debtor filed a Notice of Motion for Rehearing and Stay pending determination thereof and obtained a hearing date of November 3, 1987. On or about

January 8, 1988, the court denied debtor's Motion for Rehearing and Stay pending appeal.

10. The debtor filed an appeal of the January 8, 1988 order on or about January 15, 1988. The court's order was upheld on appeal.

11. On November 7, 1988, First Interstate Bank of California filed a Motion for Relief from Stay, Motion Control No. KAK-1, relative to the property known as 1825 Davis Pl. Rd., Mt. Shasta, California.

12. On January 11, 1989, an Order Modifying the Automatic Stay was entered whereby Motion KAK-1 was granted and the debtor was ordered to make adequate protection payments of $1,200.00 per month on the first deed of trust held by FIMC and the second and third deeds of trust held by FICAL.

13, A Motion for Reconsideration of the January 11, 1989 order was filed by

the debtor and heard on January 31 1989. The court granted the motion for reconsideration and the January 11, 1989 order was modified to allow the debtor to make a payment of $325.00 per month to FICAL on the obligations represented by the second and third deeds of trust.

14. On or about November 15, 1988, First Interstate Mortgage Company filed Motion DMT-2 (now known as DMT-3) to determine the amount of their secured claim under the first deed of trust.

15. Also, on January 31, 1989, Motiom DMT-3 was submitted for the purpose of determining the amount of FIMC and FICAL's secured claims.

16. A memorandum decision on Motion DMT-3 was filed on June 30, 1989, determining the amounts of the respective secured claims of FICAL and FIMC. An order on Motion DMT-3 was filed by FICAL on July 18, 1989. An order after hearing on

Motion DMT-3 was filed by FIMC on or about July 28, 1989. Debtor owes FIMC and FICAL in excess of $135,000.00. Apart from two payments of $325.00 to FICAL in 1989, no payments have been made to FICAL or FIMC since 1985.

17. A motion to convert the case to the Chapter 7 was filed on or about June 20, 1989 by FIMC, Motion Control No. KAW-1. The motion was joined by FICAL and creditor Franklin S. Cibula, a Law Corporation.

18. Debtor is unable to pay even the most modest monthly payments of $325.00 on the two junior deeds of trust.

19. Debtor's demonstrated inability to meet minimal monthly obligations makes the possibility of qualifying for a residential loan in excess of $135,000.00 doubtful.

20. Debtor has taken no affirmative action on her case which has been pending for more than four years other than to file a

proposed plan of reorganization and related disclosure statements, to which objections were filed by her major creditors.

21. Debtor has not submitted any evidence of efforts to refinance, liquidate any portion of her property or rezone and parcel her home property.

22. Debtor has made no effort to foreclose on the two deeds of trust she purportedly holds on 40 acres of land in Tehama County even though she has not collected any payments on the underlying notes.

23. Debtor has lost her appeal in the Shasta Terra case, but at least may be entitled to $50,000.00 of the settlement proceeds. However, debtor is appealing from the settlement even though the settlement is quite advantageous to her.

CONCLUSIONS OF LAW

To the extent that any of the foregoing findings of fact are more properly conclusions of law, they are deemed

conclusions of law.

11 U.S.C. Section 1112(b) of the Bankruptcy Code states in part:

> (b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under Chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including:
>
> (1) Continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
>
> (2) Inability to effectuate a plan;
>
> (30 Unreasonable delay by the debtor that is prejudicial to creditors;
>
> (4) Failure to propose a plan under § 1121 of this title within any time fixed by the court;
>
> (5) Denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or modification of a plan.

In this case, the court has determined that there is continuing loss to and diminution of the estate and there is

an absence of a reasonable likelihood of rehabilitation.

Furthermore, the court finds that the debtor is unable to effectuate a plan of reorganization and that there has been unreasonable delay by the debtor that has been prejudicial to the creditors.

Having found the continuing loss to and diminution of the estate and the absence of a reasonable likelihood of rehabilitation and unreasonable delay by the debtor which has been prejudicial to the creditors, the court orders the case converted to a Chapter 7 forthwith.

Dated September 27, 1989 and signed by:

DAVID E. RUSSELL, Bankruptcy Court Judge

Submitted by:

Dumas & Taron

By: Richard Malatt
Attorneys for First Interstate
Bank of California [sic]

Order Filed April 1, 1992

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re:

Case No. 91-15722

Weston vs. First Interstate Bank, et al.

Before: NORRIS, BEEZER and LEAVY

The petition for rehearing is denied.

Order Filed April 9, 1991

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:

BAP No. EC 89-1256,

EC 89-1796 and EC 89-1816
(Consolidated)

Weston vs. First Interstate Bank, et al.

Before: RUSSELL, PERRIS and MEYERS

The Panel has considered the Appellants motion for rehearing and all of the pleadings filed thereafter. The Appellant's motion for rehearing is hereby ORDERED DENIED.

The Appellee's motion for extension of time to file an opposition to the motion for rehearing is hereby ORDERED DENIED as moot.

The Appellant's request for Bankruptcy Rule 9011 sanctions is hereby ORDERED DENIED.

Order Filed February 26, 1987

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:

BAP No. EC 86-1214

JOANNE M. WESTON, Debtor.

CONDITIONAL ORDER OF DISMISSAL

Before: Calvin K. Ashland, Bank. Judge

It appears from the file in this appeal that a Trustee's Sale was held on February 24, 1986, following an order to dismiss the debtor's Chapter 11 petition. Therefore, it appears that this appeal may be moot. It is hereby

ORDERED that the Appellant provide a written explanation within 20 days from the date of this order to show cause why this appeal should not be dismissed as moot. Please submit an original and three copies, and proof of service on opposing counsel, of the response to this order.

Order Filed April 9, 1987

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:

BAP No. EC 86-1214

JOANNE M. WESTON, Debtor

Before: Mooreman and Meyers, Bank. Judges

The February 26, 1987, Conditional Order of Dismissal is hereby WITHDRAWN.

Order Filed May 20, 1988

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:

BAP No. EC 86-1214

JOANNE M. WESTON, Debtor

Before: MEYERS, ASHLAND and JONES

This is an appeal from a the [sic] trial court's sua sponte dismissal of Debtor-Appellant Joanne M. Weston's ("Weston") Chapter 11 case. The trial court dismissed the filing after Weston was unsuccessful at filing disclosure statements and a plan which complied with the requirements of the Bankruptcy Code ("Code"). We REVERSE the trial court.

We begin by noting that this appeal is timely. The Appellant's motion for reconsideration, although not authorized by name in the Bankruptcy Rules, is properly considered a motion to alter or amend judgment under Federal Rule of Civil

Procedure 59(e), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 9023. See In re Curry and Sorensen, Inc., 57 B.R. 824 (9th Cir. BAP 1986). Rule 59(e) requires a movant to serve the motion "not later than 10 days after entry of the judgment." This appeal is from an underlying judgment entered on January 14, 1986. The proof of service attached to the Appellant's motion to reconsider indicates that on January 17, 1986 the motion was served by mail. The motion was timely under Rule 59(e) and Bankruptcy Rule 9023 and, therefore, the motion tolled the time to file the notice of appeal under Bankruptcy Rule 8002(b).

Section 1112(b) indicates that the court may only dismiss or convert a case on application from an interested party. 11 U.S.C. § 1112(b) (Supp IV 1986)[1]; see

[1] Recent amendments to the Code have affected the application of § 1112(b) by specifically

In re Moog, 774 F.2d 1073, 1079 (11th Cir. 1985); In re Warner, 30 B.R. 528, 529 (9th Cir. BAP 1983). In this case, application was made by the estate administrator. The estate administrator is not an interested party. See In re Gusam Restaurant Corp., 737 F.2d 274, 275 n. 1 (2nd Cir. 1984). The trial court's dismissal was, therefore, not authorized by section 1112(b) and must be vacated.

The order dismissing the underlying case is VACATED and the case is REMANDED for proceedings consistent with this decision.

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allowing the court to act sua sponte whether or not the Code requires application by a party in interest. See 11 U.S.C. § 105(a) (Supp IV 1986); In re Rubenstein, 71 B.R. 777 (9th Cir. BAP 1987). The change in the Code was not effective at the time of this dismissal or the filing of the notice of appeal. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No.99-554 § 302(a) 100 Stat. 3088, 3119 (1986).

Portions of Reporter's Transcript
February 14, 1989 Hearing on MCN: DMT-2/3
Before the Honorable David E. Russell,
Judge, U.S. Bankruptcy Court

Page 40, Reporter's Transcript

THE COURT: And I also meant to say that, Ms. Weston, that I am not making a decision on attorneys fees at this time.

Ms. WESTON: This isn't regarding attorneys fees.

THE COURT: I'm only going to make it in respect to interest, late charges, payments to the first -- I mean, payments on taxes.

Page 43, Reporter's Transcript

MR. ORLICK: Finally, your Honor, would you like the attorneys fees statements that we've prepared?

MS. WESTON: And your Honor, may I ask why I'm not given a copy, if I might be stuck paying for them?

THE COURT: One of the things that someone can do is request that I look at something without letting the other side look at it. If I find items in here that are confidential, then I can make arrangements so that you can see --

MS. WESTON: Portions of it?

THE COURT: -- portions of it. And we can perhaps re-describe those matters that are -- that are confidential, so that no one is hurt. In other words, you will have an opportunity, I assure you, of looking at these fees before I make any ruling on them.

Page 44, Reporter's Transcript

THE COURT: Well, assuming that Ms. Weston doesn't have anything further involved, I think it would be appropriate, as far as the fees are concerned, that I do be given a copy, as has

been done here, of the billings, so that I can see that the work that has been done in respect to attorneys fees is appropriate.

Page 48, Reporter's Transcript

MS. WESTON: Disputes over the amount of attorneys fees and interest.

THE COURT: That's very easy to resolve. You just get enough money, either by selling the property, refinancing the property, borrowing money, or whatever, settling some of your other cases, so that if there's a dispute on attorneys fees, we will put that in an interest bearing account, and, you know, if you prevail on the argument, you get the money. If they prevail, they get the money. We can take care of that.

(Hearing then concluded)

Portions of the Reporter's Transcript
August 22, 1989 Hearing on MCN: DMT-4
(Motion to Convert Case to Chapter 7)
Before the Honorable David E. Russell,
Judge, U.S. Bankruptcy Court

Page 10, Reporter's Transcript

THE COURT: But I think the most frustrating thing is that you will not accept defeat. And you have to learn that is what life is about. You cannot win everything. So what you do, I guess, is you take a practical approach. You say, "I cannot have this. But maybe if I do this, I can salvage something." And you haven't done that. You have appealed every single order that I have -- that I have put out. I thought I had a lot of compassion for your situation. You're a very intelligent woman. I must say that you have represented yourself in some respects better than

attorneys. You have done a wonderful job in that regard. But I seem to see a lack of practical ability to say, "Hey, we have got to go forward with certain things that I can salvage out of here." You want to salvage. And, quite frankly, I do not think you're going to.

Page 11, Reporter's Transcript

THE COURT: But I have no choice. We have gone too long. I think Mr. McManus has summarized from my prior orders [June 30, 1989 Memorandum Decision] what has happened in this case, where this case is. And I have no choice but to convert it. And that it my order. I am converting this case to a Chapter 7.

Notice of Appeal Filed March 13, 1989

In re: MCN: JMW-10

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

JoAnne M. weston, the debtor in possession in the above Chapter 11 proceedings, hereby appeals to the District Court from the Orders issued by the Honorable David E. Russell, Bankruptcy Judge, regarding Motion Nos. JMW-3, JMW-5, JMW-3A, JMW-5A, KAK-1 and DMT-2, as modified by the subsequent Order Granting Debtor's Motion for Reconsideration, Motion No. jmw-10, which Order was filed in these proceedings on March 2, 1989.

The parties to the Orders appealed from and the names and addresses of their respective attorneys, other than the petitioner, are as follows:

FIRST INTERSTATE MORTGAGE COMPANY, whose attorneys are EVANS, DUMAS & TARON, 12400

Wilshire Blvd., Suite 450, Los Angeles, CA 90025; and

FIRST INTERSTATE BANK, whose attorneys are TOBIN & TOBIN, One Montgomery Street, 15th Floor, San Francisco, CA 94104.

Dated: March 9, 1989 By:

JoAnne M. Weston, Debtor

Acting in pro per